

R. 11216

SKINNER AND HUNT CORPORATION, ATTORNEYS

FOR THE UNITED STATES OF AMERICA, DEFENDANTS  
VERSUS  
MEXICO COMMISSION, THE BALTIMORE  
RAILROAD COMPANY, ET AL.

WRIT OF HABEAS CORPUS IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

(26,013)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 546.

SKINNER AND EDDY CORPORATION, APPELLANT,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, THE BALTIMORE & OHIO RAILROAD COMPANY ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON.

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1 In the United States District Court for the District of Oregon.

In Equity.

No. 7229.

SKINNER AND EDDY CORPORATION, Petitioner,

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, The Baltimore and Ohio Railroad Company, Bessemer and Lake Erie Railroad Company, Chicago, Burlington and Quincy Railroad Company, Chicago and Northwestern Railway Company, Chicago, Milwaukee and St. Paul Railway Company, The Great Northern Railway Company, Illinois Central Railroad Company, The New York Central Railroad Company, The New York, Chicago and St. Louis Railroad Company, Northern Pacific Railway Company, Oregon Short Line Railroad Company, Oregon-Washington Railroad and Navigation Company, Pennsylvania Company, The Pittsburgh and Lake Erie Railroad Company, The Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company, and Union Pacific Railroad Company, Defendants.

2 *Citation en Appeal.*

UNITED STATES OF AMERICA, ss:

The President of the United States to The United States of America, Interstate Commerce Commission, The Baltimore and Ohio Railroad Company, Bessemer and Lake Erie Railroad Company, Chicago, Burlington and Quincy Railroad Company, Chicago and Northwestern Railway Company, Chicago, Milwaukee and St. Paul Railway Company, The Great Northern Railway Company, Illinois Central Railroad Company, The New York Central Railroad Company, The New York, Chicago and St. Louis Railroad Company, Northern Pacific Railway Company, Oregon Short Line Railroad Company, Oregon-Washington Railroad and Navigation Company, Pennsylvania Company, The Pittsburgh and Lake Erie Railroad Company, The Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company, and Union Pacific Railroad Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington within thirty days from the date hereof pursuant to an appeal duly allowed and filed in the Clerk's office of the United States District Court for the District of Oregon wherein Skinner and Eddy Corporation is ap-

pellant and you are appellees, to show cause, if any there be, why the final order or decree rendered against said appellant in said appeal should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable William B. Gilbert, United States Circuit Judge, District of Oregon; the Honorable Charles E. Wolverton, United States District Judge, District of Oregon; and the Honorable Robert S. Bean, United States District Judge, District of Oregon, this 2nd day of April, 1917.

WM. B. GILBERT,  
*United States Circuit Judge.*

CHAS. E. WOLVERTON,  
*United States District Judge.*

R. S. BEAN,  
*United States District Judge.*

3. Service of the within citation on appeal and receipt of a copy is hereby admitted this 3rd day of April, 1917.

JAMES B. KERR,  
*One of Solicitors for The New York Central Railroad Company, The Pittsburgh and Lake Erie Railroad Company, The New York, Chicago and St. Louis Railroad Company, The Great Northern Railway Company, and Northern Pacific Railway Company.*

A. C. SPENCER,  
BERG,  
*One of Solicitors for Chicago and Northwestern Railway Company, Chicago, Burlington and Quincy Railroad Company, Illinois Central Railroad Company, Union Pacific Railroad Company, Oregon Short Line Railroad Company, and Oregon-Washington Railroad & Navigation Company.*

A. C. SPENCER,  
BERG,  
*Solicitor for Chicago, Milwaukee & St. Paul Railway Company.*

JOHN J. BECKMAN,  
*Assistant U. S. Attorney, One of Solicitors for The United States of America and Interstate Commerce Commission.*

GEORGE M. BROWN,  
*Attorney General of the State of Oregon.*

[Endorsed:] In Equity. No. 7229. 19-279. In the District Court of the United States for the District of Oregon.

Skinner & Eddy Corporation, Petitioner, v. The United States of America et al., Defendants. Citation on Appeal.

U. S. District Court. Filed Apr. 18, 1917. G. H. Marsh, Clerk, District of Oregon.

Teal, Minor & Winfree, 1016 Spalding Building, Portland, Oregon, Attorneys for Petitioner.

4 In the United States District Court for the District of Oregon.

In Equity.

No. 7229.

SKINNER AND EDDY CORPORATION, Petitioner,

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, The Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company, Pennsylvania Company, and Fourteen Other Railroad Companies, Defendants.

*Affidavit of Service of Citation on Appeal.*

STATE OF OREGON,

County of Multnomah, ss:

I, Thaddeus W. Veness, being first duly sworn, on my oath depose and say: I am a citizen of the State of Oregon, am over the age of 21 years and belong to the white or caucasian race; I personally served the citation on appeal in the above entitled suit upon said Pennsylvania Company by delivering on April 12, 1917 to John S. Campbell in person, district freight and passenger agent of said Pennsylvania Company in the City of Portland, State of Oregon, a copy of said citation on appeal which copy was duly certified by William C. McCulloch, one of the petitioner's solicitors, to be a true copy of the original citation on appeal; I personally served the citation on appeal in the above entitled suit upon said The Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company in the City of

5 Portland, State of Oregon by delivering on April 12, 1917 to John S. Campbell in person, district freight and passenger agent of said The Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company in the said City and State, a copy of said citation on appeal which copy was duly certified by William C. McCulloch, one of the petitioner's solicitors, to be a true copy of the original citation on appeal.

THADDEUS W. VENESS.

Subscribed and sworn to before me this 12th day of April, 1917.

[Seal L. G. Roberts, Notary Public, State of Oregon.]

L. G. ROBERTS,  
Notary Public for Oregon.

My commission will expire Jan. 11, 1921.

6 [Endorsed:] In Equity. No. 7229. 19-279. In the District Court of the United States for the District of Oregon. Skinner & Eddy Corporation, Petitioner, v. The United States of America et al., Defendants.

Affidavit of Service of Citation on Appeal.

U. S. District Court. Filed Apr. 18, 1917. G. H. Marsh, Clerk, District of Oregon.

Teal, Minor & Winfree, 1016 Spalding Building, Portland, Oregon, Solicitors for Petitioner.

7 In the United States District Court for the District of Oregon.

In Equity.

No. 7229.

SKINNER AND EDDY CORPORATION, Petitioner,

VS.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, The Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company, Pennsylvania Company, The Baltimore & Ohio Railroad Company, The Bessemer & Lake Erie Railroad Company, and Twelve Other Railroad Companies, Defendants.

*Affidavit of Service of Citation on Appeal*

STATE OF MARYLAND,

*City of Baltimore, ss:*

I, Henry W. Schultheis, being first duly sworn on oath depose and say: I am a citizen of the State of Maryland, am over the age of 21 years and belong to the white or Caucasian race; I personally served the citation on appeal in the above entitled suit upon said The Baltimore & Ohio Railroad Company by delivering on April 19, 1917, to George M. Shriver in person, Vice-President of said Baltimore & Ohio Railroad Company, in the City of Baltimore, State of Maryland, a copy of said citation on appeal which copy was duly certified by William C. McCulloch, one of the petitioner's solicitors, to be a true copy of the original citation on appeal.

HENRY W. SCHULTHEIS.

Subscribed and sworn to before me this 19th day of April, 1917.

[Seal, John Skeen, Notary Public, Baltimore County, Md.]

JOHN HENRY SKEEN,

*Notary Public for the State of Md.*

My commission expires May, 1918.

8 [Endorsed:] No. 7229. 19-279. In the District Court of the United States for the District of Oregon. In Equity.

Skinner and Eddy Corporation, Petitioner, v. The United States of America, and others, Defendants.

Affidavit of Service of Citation on Appeal.

U. S. District Court. Filed Apr. 25, 1917. G. H. Marsh, Clerk, District of Oregon.

Teal, Minor & Winfree, 1016 Spalding Building, Portland, Oregon.

9 In the United States District Court for the District of Oregon.

In Equity.

No. 7229.

SKINNER AND EDDY CORPORATION, Petitioner,

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, The Baltimore & Ohio Railroad Company, Bessemer & Lake Erie Railroad Company, Pennsylvania Company, The Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company, and Twelve Other Railroad Companies, Defendants.

*Affidit of Service of Citation on Appeal.*

DISTRICT OF COLUMBIA, ss:

I, Stanley D. Willis, being first duly sworn, deposes and says: I am a citizen of the United States of America and a member of the Bar of the District of Columbia; I am over the age of twenty-one years and I belong to the white or Caucasian race; I personally served the citation on appeal in the above entitled suit upon said Pennsylvania Company by delivering on the 18th day of April, 1917, to F. D. McKenney, in person at his office in the City of Washington, District of Columbia, a copy of said citation on appeal, which copy was duly certified by William C. McCulloch, one of the petitioner's solicitors, to be a full, true and exact copy of the original citation on appeal, said F. D. McKenney being the agent designated by said Pennsylvania Company to the Interstate Commerce Commission as the person upon whom service of all notices and processes may be made under the provisions of Section 6, of the Act of Congress of June 18, 1910, entitled An Act to Create a Commerce Court, etc.; I personally served the citation on appeal in the above entitled suit upon said Bessemer and Lake Erie Railroad Company by delivering on the 18th day of April, 1917, to W. N. Akers in person at his office in the City of Washington, District of Columbia, a copy of said citation on appeal, which copy was duly certified by William C. McCulloch, one of the petitioner's  
10 solicitors, to be a full, true and exact copy of the original citation on appeal, said W. N. Akers being the agent designated by said Bessemer and Lake Erie Railroad Company to the Interstate Commerce Commission as the person upon whom

service of all notices and processes may be made under the provisions of Section 6, of the Act of Congress of June 18, 1910, entitled An Act to Create a Commerce Court, etc.; I personally served the citation on appeal in the above entitled suit upon said The Baltimore and Ohio Railroad Company, by delivering on the 18th day of April, 1917, to G. E. Hamilton in person at his office in the City of Washington, District of Columbia, a copy of said citation on appeal, which copy was duly certified by William C. McCulloch, one of the petitioner's solicitors, to be a full, true and exact copy of the original citation on appeal, said G. E. Hamilton being the agent designated by said The Baltimore & Ohio Railroad Company to the Interstate Commerce Commission as the person upon whom service of all notices and processes may be made under the provisions of Section 6 of the Act of Congress, of June 18, 1910, entitled An Act to Create a Commerce Court, etc.; and I personally served the citation on appeal in the above entitled suit upon said The Pittsburgh, Cincinnati, Chicago & St. Louis Railroad Company by delivering on the 18th day of April 1917, to F. D. McKenney in person at his office in the City of Washington, District of Columbia, a copy of said citation on appeal, which copy was duly certified by William C. McCulloch, one of the petitioner's solicitors, to be a full, true and exact copy of the original citation on appeal, said F. D. McKenney being the agent designated by said The Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company to the Interstate Commerce Commission as the person upon whom service of all notices and processes may be made under the provisions of section 6 of the Act of Congress of June 18, 1910, entitled an Act to Create a Commerce Court etc.

11

STANLEY D. WILLIS.

Subscribed and sworn to before me this 19 day of April, 1917.  
[Seal James H. Costelo, Notary Public, District of Columbia.]

JAMES H. COSTELO,  
*Notary Public.*

12

[Endorsed:] In Equity. No. 7229. 19-278.  
Skinner & Eddy Corporation, Petitioner, v. The United States of America, and others, Defendants.

Affidavit of Service of Citation on Appeal.  
U. S. District Court. Filed Apr. 25, 1917. G. H. Marsh, Clerk,  
District of Oregon.

13 In the United States District Court for the District of Oregon.

In Equity.

No. 7229.

SKINNER AND EDDY CORPORATION, Plaintiff,

VS.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, The Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company, Pennsylvania Company, The Baltimore & Ohio Railroad Company, The Bessemer & Lake Erie Railroad Company, and Twelve Other Railroad Companies, Defendants.

*Affidavit of Service of Citation on Appeal.*

STATE OF PENNSYLVANIA,

*County of Allegheny, ss:*

I, C. W. Parker, being first duly sworn on oath depose and say, that I am a citizen of the State of Pennsylvania, and over the age of 21 years and belong to the white or Caucasian race; I personally served the citation on appeal in the above entitled suit upon the Pennsylvania Company, one of the defendants in the above entitled cause, by delivering, on April 24th, 1917, to C. B. Heiserman, in person, General Counsel of said Pennsylvania Company, in the City of Pittsburgh, a copy of said citation on appeal which copy was duly certified by William C. McCulloch, one of the petitioner's solicitors, to be a true copy of the original citation on appeal; I personally served the citation on appeal in the above entitled suit upon the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company, by delivering, on April 24th, 1917, to C. B. Heiserman in person, General Counsel of said The Pittsburgh, Cincinnati, Chicago, & St. Louis Railway Company, in the City of Pittsburgh, State of Pennsylvania, a copy of said citation on appeal

14 which copy was duly certified by William C. McCulloch, one of the petitioner's solicitors, to be a true copy of the original citation on appeal; and I personally served the citation on appeal in the above entitled suit upon said Bessemer & Lake Erie Railroad Company, by delivering, on April 24th, 1917, to Reed, Smith, Shaw & Beal in person, General Counsel of said Bessemer & Lake Erie Railroad Company, in said City of Pittsburgh, State of Pennsylvania, a copy of said citation on appeal which copy was duly certified by William C. McCulloch, one of the



petitioner's solicitors, to be a true copy of the original citation on appeal.

C. W. PARKER.

Subscribed and sworn to before me this 24th day of April, 1917.

[Seal Albert C. Rohland, Notary Public, Pittsburgh, Pa.]

ALBERT C. ROHLAND,  
*Notary Public.*

My commission will expire Jan. 21", 1919.

15 [Endorsed:] In Equity. No. 7229. 19-279.  
Skinner & Eddy Corporation, Plaintiff, vs. The United States, et al. Defendants.

Affidavit of Service of Citation on Appeal.

U. S. District Court. Filed Apr. 28, 1917. G. H. Marsh, Clerk,  
District of Oregon.

16 In the United States District Court for the District of Oregon.

In Equity.

No. 7229.

SKINNER AND EDDY CORPORATION, Petitioner,

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, The Baltimore and Ohio Railroad Company, Bessemer and Lake Erie Railroad Company, Chicago, Burlington and Quincy Railroad Company, Chicago and Northwestern Railway Company, Chicago, Milwaukee and St. Paul Railway Company, The Great Northern Railway Company, Illinois Central Railroad Company, The New York Central Railroad Company, The New York, Chicago and St. Louis Railroad Company, Northern Pacific Railway Company, Oregon Short Line Railroad Company, Oregon-Washington Railroad and Navigation Company, Pennsylvania Company, The Pittsburgh and Lake Erie Railroad Company, The Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company, and Union Pacific Railroad Company, Defendants.

*Citation on Appeal.*

UNITED STATES OF AMERICA, *vs.*

The President of the United States to the United States of America, Interstate Commerce Commission, The Baltimore and Ohio Railroad Company, Bessemer and Lake Erie Railroad Company, Chicago, Burlington and Quincy Railroad Company, Chicago and Northwestern Railway Company, Chicago, Milwaukee and St. Paul Railway Company, The Great Northern Railway Company, Illinois

Central Railroad Company, The New York Central Railroad Company, The New York, Chicago and St. Louis Railroad Company, Northern Pacific Railway Company, Oregon Short Line Railroad Company, Oregon-Washington Railroad and Navigation Company, Pennsylvania Company, The Pittsburgh and Lake Erie Railroad Company, The Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company, and Union Pacific Railroad Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington within thirty days from the date hereof pursuant to an appeal duly allowed and filed in the Clerk's office of the United States District Court for the District of Oregon wherein Skinner and Eddy Corporation is appellant and you are appellees, to show cause, if any there be, why the final order or decree rendered against said appellant in said appeal should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable William B. Gilbert, United States Circuit Judge, District of Oregon; the Honorable Charles E. Wolverton, United States District Judge, District of Oregon; and the Honorable Robert S. Bean, United States District Judge, District of Oregon, this 2nd day of April, 1917.

WM. B. GILBERT,

*United States Circuit Judge,*

CHAS. E. WOLVERTON,

*United States District Judge,*

R. S. BEAN,

*United States District Judge.*

I hereby certify that the foregoing is a full, true and exact copy of the original citation on appeal.

WILLIAM C. McCULLOCH,

*One of Petitioner's Solicitors.*

Portland, Oregon, April 12, 1917.

Service of the above citation accepted this 24th day of April, 1917, for Pennsylvania Company.

C. B. HEISERMAN,

*General Counsel.*

[Endorsed:] 7229. 19-279. In the United States District Court for the District of Oregon. In Equity. No. 7229.

Skinner & Eddy Corporation, Petitioner, v. The United States of America, and others, Defendants.

Acceptance of Service of Citation on Appeal.

U. S. District Court. Filed Apr. 28, 1917. G. H. Marsh, Clerk, District of Oregon.

18 In the United States District Court for the District of Oregon.

In Equity.

No. 7229.

SKINNER AND EDDY CORPORATION, Petitioner,

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, The Baltimore and Ohio Railroad Company, Bessemer and Lake Erie Railroad Company, Chicago, Burlington and Quincy Railroad Company, Chicago and Northwestern Railway Company, Chicago, Milwaukee and St. Paul Railway Company, The Great Northern Railway Company, Illinois Central Railroad Company, The New York Central Railroad Company, The New York, Chicago and St. Louis Railroad Company, Northern Pacific Railway Company, Oregon Short Line Railroad Company, Oregon-Washington Railroad and Navigation Company, Pennsylvania Company, The Pittsburgh and Lake Erie Railroad Company, The Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company, and Union Pacific Railroad Company, Defendants.

*Citation on Appeal.*

UNITED STATES OF AMERICA, *et al.*:

The President of the United States to the United States of America, Interstate Commerce Commission, The Baltimore and Ohio Railroad Company, Bessemer and Lake Erie Railroad Company, Chicago, Burlington and Quincy Railroad Company, Chicago and Northwestern Railway Company, Chicago, Milwaukee and St. Paul Railway Company, The Great Northern Railway Company, Illinois Central Railroad Company, The New York Central Railroad Company, The New York, Chicago and St. Louis Railroad Company, Northern Pacific Railway Company, Oregon Short Line Railroad Company, Oregon-Washington Railroad and Navigation Company, Pennsylvania Company, The Pittsburgh and Lake Erie Railroad Company, The Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company, and Union Pacific Railroad Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington within thirty days from the date hereof pursuant to an appeal duly allowed and filed in the Clerk's office of the United States District Court for the District of Oregon wherein Skinner and Eddy Corporation is appellant and you are appellees, to show cause, if any there be, why the final order or decree rendered against said appellant in said appeal

should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable William B. Gilbert, United States Circuit Judge, District of Oregon; the Honorable Charles E. Wolverton, United States District Judge, District of Oregon; and the Honorable Robert S. Beam, United States District Judge, District of Oregon, this 2nd day of April, 1917.

WM. B. GILBERT,  
*United States Circuit Judge.*

CHAS. E. WOLVERTON,  
*United States District Judge.*

R. S. BEAM,  
*United States District Judge.*

I hereby certify that the foregoing is a full, true and exact copy of the original citation on appeal.

WILLIAM C. McCULLOCH,  
*One of Petitioner's Solicitors.*

Portland, Oregon, April 12, 1917.

Service of the above citation accepted this 24th day of April, 1917, for the Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company.

C. B. HEISERMAN,  
*General Counsel.*

[Endorsed:] In the United States District Court for the District of Oregon. In Equity. No. 7229. 19-279.

Skinner & Eddy Corporation, Petitioner, v. The United States of America, and others, Defendants.

Acceptance of Service of Citation on Appeal.

U. S. District Court. Filed Apr. 28, 1917. G. H. Marsh, Clerk, District of Oregon.

20 In the United States District Court for the District of Oregon.

In Equity.

No. 7229.

SKINNER AND EDDY CORPORATION, Petitioner,

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, The Baltimore and Ohio Railroad Company, Bessemer and Lake Erie Railroad Company, Chicago, Burlington and Quincy Railroad Company, Chicago and Northwestern Railway Company, Chicago, Milwaukee and St. Paul Railway Company, The Great Northern Railway Company, Illinois Central Railroad Company, The New York Central Railroad Company, The New York, Chicago and St. Louis Railroad Company, Northern Pacific Railway Company, Oregon Short Line Railroad Company, Oregon-Washington Railroad and Navigation Company, Pennsylvania Company, The Pittsburgh and Lake Erie Railroad Company, The Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company, and Union Pacific Railroad Company, Defendants.

*Citation on Appeal.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the United States of America, Interstate Commerce Commission, The Baltimore and Ohio Railroad Company, Bessemer and Lake Erie Railroad Company, Chicago, Burlington and Quincy Railroad Company, Chicago and Northwestern Railway Company, Chicago, Milwaukee and St. Paul Railway Company, The Great Northern Railway Company, Illinois Central Railroad Company, The New York Central Railroad Company, The New York, Chicago and St. Louis Railroad Company, Northern Pacific Railway Company, Oregon Short Line Railroad Company, Oregon-Washington Railroad and Navigation Company, Pennsylvania Company, The Pittsburgh and Lake Erie Railroad Company, The Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company, and Union Pacific Railroad Company, Greeting:

21 You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington within thirty days from the date hereof pursuant to an appeal duly allowed and filed in the Clerk's office of the United States District Court for the District of Oregon wherein Skinner and Eddy Corporation is appellant and you are appellees, to show cause, if any there be, why the final order or decree rendered against said appellant in said appeal should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable William B. Gilbert, United States Circuit Judge, District of Oregon; the Honorable Charles E. Wolverton, United States District Judge, District of Oregon; and the Honorable Robert S. Bean, United States District Judge, District of Oregon, this 2nd day of April, 1917.

WM. B. GILBERT,  
*United States Circuit Judge.*  
CHAS. E. WOLVERTON,  
*United States District Judge.*  
R. S. BEAN,  
*United States District Judge.*

I hereby certify that the foregoing is a full, true and exact copy of the original citation on appeal.

WM. C. McCULLOCH,  
*One of Petitioner's Solicitors.*

Portland, Oregon, April 12, 1917.

Service of the above citation accepted this 24th day of April, 1917, for the Bessemer and Lake Erie Railroad Company.

REED, SMITH, SHAW & BEAL,  
*Attys. for Bessemer & Lake Erie R. R. Co.*

[Endorsed:] In the United States District Court for the District of Oregon. In Equity. No. 7229. 19-279.

Skinner & Eddy Corporation, Petitioner, v. The United States of America, and others, Defendants.

Acceptance of Service of Citation on Appeal.

U. S. District Court. Filed Apr. 28, 1917. G. H. Marsh, Clerk, District of Oregon.

22 In the District Court of the United States for the District of Oregon, July Term, 1916.

It is ordered, that on the 21st day of August, 1917, there was duly filed in the District Court of the United States for the District of Oregon, a Petition, in words and figures as follows, to wit:

- 23 In the District Court of the United States for the District of Oregon.

In Equity.

SKINNER AND EDDY CORPORATION, Petitioner,

VS.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, The Baltimore and Ohio Railroad Company, Bessemer and Lake Erie Railroad Company, Chicago, Burlington and Quincy Railroad Company, Chicago and Northwestern Railway Company, Chicago, Milwaukee and St. Paul Railway Company, The Great Northern Railway Company, Illinois Central Railroad Company, The New York Central Railroad Company, The New York, Chicago and St. Louis Railroad Company, Northern Pacific Railway Company, Oregon Short Line Railroad Company, Oregon-Washington Railroad and Navigation Company, Pennsylvania Company, The Pittsburgh and Lake Erie Railroad Company, The Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company, and Union Pacific Railroad Company, Defendants.

*Petition.*

Joseph N. Teal, William C. McCulloch, Solicitors for Petitioner.  
Teal, Minor & Winfree, Portland, Oregon; L. B. Steadman, Seattle, Washington; W. E. Creed, San Francisco, California, of Counsel.  
Filed August 21, 1916. G. H. Marsh, Clerk.

- 24 In the District Court of the United States for the District of Oregon.

In Equity.

SKINNER AND EDDY CORPORATION, Petitioner,

V.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, The Baltimore and Ohio Railroad Company, Bessemer and Lake Erie Railroad Company, Chicago, Burlington and Quincy Railroad Company, Chicago and Northwestern Railway Company, Chicago, Milwaukee and St. Paul Railway Company, The Great Northern Railway Company, Illinois Central Railroad Company, The New York Central Railroad Company, The New York, Chicago and St. Louis Railroad Company, Northern Pacific Railway Company, Oregon Short Line Railroad Company, Oregon-Washington Railroad and Navigation Company, Pennsylvania Company, The Pittsburgh and Lake Erie Railroad Company, The Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company, and Union Pacific Railroad Company, Defendants.

*Petition.*

To the Honorable the Judges of the District Court of the United States for the District of Oregon, Sitting in Equity:

Your petitioner, Skinner and Eddy Corporation, brings this its petition against The United States of America, Interstate Commerce Commission, The Baltimore and Ohio Railroad Company, Bessemer and Lake Erie Railroad Company, Chicago, Burlington and Quincy Railroad Company, Chicago and North-Western Railway Company, Chicago, Milwaukee and St. Paul Railway Company, The Great Northern Railway Company, Illinois Central Railroad Company, The New York Central Railroad Company, The New York, Chicago and St. Louis Railroad Company, Northern Pacific Railway Company, Oregon Short Line Railroad Company, Oregon-Washington Railroad and Navigation Company, Pennsylvania Company, The Pittsburgh and Lake Erie Railroad Company, The Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company, and Union Pacific Railroad Company, and thereupon complains and says:

## I.

Your petitioner is a corporation duly organized and existing under the laws of the State of Washington with its principal place of business at Seattle.

## II.

The United States of America is a corporation created by the constitution of the United States with its principal place of business in the City of Washington and the District of Columbia.

## III.

The Interstate Commerce Commission was created by an act of Congress entitled "An Act to regulate Commerce," and approved February 4, 1887, and is authorized and required to execute and enforce the provisions of that act and of acts amendatory thereof or supplementary thereto.

## IV.

The Baltimore and Ohio Railroad Company is and at all times herein mentioned was a corporation duly organized and existing under the laws of the States of Maryland and Virginia.

## V.

Bessemer and Lake Erie Railroad Company is and at all times herein mentioned was a corporation duly organized and existing under the laws of the State of Pennsylvania.



## VI.

Chicago, Burlington and Quincy Railroad Company is and at all times herein mentioned was a corporation duly organized and existing under the laws of the State of Illinois.

## VII.

Chicago and North-Western Railway Company is and at all times herein mentioned was a corporation duly organized and existing under the laws of the States of Illinois and Wisconsin.

## VIII.

Chicago, Milwaukee and St. Paul Railway Company is and at all times herein mentioned was a corporation duly organized and existing under the laws of the State of Wisconsin.

## IX.

The Great Northern Railway Company is and at all times herein mentioned was a corporation duly organized and existing under the laws of the State of Minnesota.

## X.

Illinois Central Railroad Company is and at all times herein mentioned was a corporation duly organized and existing under the laws of the State of Illinois.

## XI.

The New York Central Railroad Company is and at all times herein mentioned was a corporation duly organized and existing under the laws of the State of New York.

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## XII.

The New York, Chicago and St. Louis Railroad Company is and at all times herein mentioned was a corporation duly organized and existing under the laws of the States of New York, Pennsylvania, Ohio and Indiana.

## XIII.

Northern Pacific Railway Company is and at all times herein mentioned was a corporation duly organized and existing under the laws of the State of Wisconsin.

## XIV.

Oregon Short Line Railroad Company is and at all times herein mentioned was a corporation duly organized and existing under the laws of the State of Utah.

## XV.

Oregon-Washington Railroad and Navigation Company is and at all times herein mentioned was a corporation duly organized and existing under the laws of the State of Oregon.

## XVI.

Pennsylvania Company is and at all times herein mentioned was a corporation duly organized and existing under the laws of the State of Pennsylvania.

## XVII.

The Pittsburgh and Lake Erie Railroad Company is and at all times herein mentioned was a corporation duly organized and existing under the laws of the State of Pennsylvania.

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## XVIII.

The Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company is and at all times herein mentioned was a corporation duly organized and existing under the laws of the States of Pennsylvania, West Virginia, Ohio, Indiana and Illinois.

## XIX.

Union Pacific Railroad Company is and at all times herein mentioned was a corporation duly organized and existing under the laws of the State of Utah.

## XX.

The defendants named in paragraphs numbered IV to XIX hereof inclusive are at all times herein mentioned were common carriers engaged in the transportation of passengers and property, wholly by railroad, between points in Atlantic coast states and in the State of Pennsylvania, including Pittsburgh, and points in the State of Washington, including Seattle, via divers through routes over their lines of railroad, and as such common carriers are subject to the provisions of the act to regulate commerce approved February 4, 1887, and acts amendatory thereof or supplementary thereto.

## XXI.

Section 4 of the act to regulate commerce, as amended June 18, 1910, provides:

"That it shall be unlawful for any common carrier subject to the provisions of this Act to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance  
 29 over the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as a through route than the aggregate of the intermediate rates subject to the provisions of this Act; but this shall not be construed as authorizing any common carrier within the terms of this Act to charge or receive as great compensation for a shorter as for a longer distance: Provided, however, that upon application to the Interstate Commerce Commission such common carrier may in special cases, after investigation, be authorized by the Commission to charge less for longer than for shorter distances for the transportation of passengers or property; and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section."

Pursuant to the provisions of this statute defendants Oregon-Washington Railroad and Navigation Company, Chicago, Milwaukee and St. Paul Railway Company, The Great Northern Railway Company, Northern Pacific Railway Company and other transcontinental carriers prior to February 17, 1911, made application to the Interstate Commerce Commission for authority to make rates from the Atlantic seaboard and interior points (including Pittsburgh) to the Pacific Coast (including Seattle) lower than rates concurrently in effect to intermediate points (including Spokane, Washington) and stated in their application that lower rates at the more distant points were necessary by reason of competition of various water carriers. After full hearing the Interstate Commerce Commission made an order entitled and hereinafter described as Fourth

Section Order No. 124, and thereby authorized the maintenance by the carriers of higher rates to intermediate points  
 30 (including Spokane) than to points on the Pacific Coast (including Seattle) on traffic originating east of the Missouri River. In July, 1914, defendants Oregon-Washington Railroad and Navigation Company, Chicago, Milwaukee and St. Paul Railway Company, The Great Northern Railway Company, Northern Pacific Railway Company and other transcontinental carriers filed with the Interstate Commerce Commission a petition asking that they be granted a hearing concerning the rates on certain commodities (including iron and steel articles) shown in a list attached to the application and designated as Schedule C, it being the purpose of the various carriers to show that as to these rates conditions justified a greater degree of relief than was afforded by the original order. In their application

the petitioners asserted that the commodities named (including iron and steel articles) originated in large volume on the Atlantic seaboard, that these commodities were adapted to water transportation and in fact moved in considerable quantities from the Atlantic seaboard to the Pacific coast by water, that the rates made by the water carriers on these commodities were extremely low and necessitated correspondingly low rates by the rail carriers from eastern seaboard territory, that the low rates so imposed from the eastern seaboard to the Pacific coast necessitated correspondingly low rates from Pittsburgh and Chicago territories (a) in order to permit the rail movement of traffic from these points to the Pacific coast in competition with the same or similar commodities moving from the Atlantic seaboard, and (b) in order to comply with the requirement of the fourth section, which prohibits carriers from making a greater charge from intermediate points than from more distant points, the more distant points in that instance being located at or

31 near the Atlantic seaboard, and that since the opening of the Panama Canal the water carriers had reduced their rates materially, shortened the time for transportation, increased the frequency of their sailings, and added materially both to their tonnage capacity and to the actual tonnage obtained. After full hearing the Interstate Commerce Commission made a report dated January 29, 1915, respecting Commodity Rates to Pacific Coast Terminals, 32 I. C. C. 611, and an amended report dated April 30, 1915, respecting the same matter, 34 I. C. C. 13. In these reports the Interstate Commerce Commission made certain findings and upon them based certain conclusions in respect of competition between carriers by rail and carriers by water to Pacific coast terminals (including Seattle) from so-called "transcontinental territories A and B," which include New York and other points on the Atlantic seaboard and Pittsburgh and all other points in Pennsylvania.

On January 29, 1915, the Interstate Commerce Commission made its Amended Fourth Section Order No. 124, basing the same upon its findings and conclusions contained in its report of the same date, and in and by this order authorized the petitioning carriers to establish and maintain the carload rates proposed in their application and shown in an appendix to the report on a large number of iron and steel articles designated by item numbers in the order, and further prescribed in the order that in the observance thereof as to rates on schedule C commodities the Pacific coast terminals should consist of

32 San Diego, Wilmington, East Wilmington, San Pedro, San Francisco, and Oakland, California, Portland, Oregon, Tacoma and Seattle, Washington, only.

On April 30, 1915, the Interstate Commerce Commission made its Amended Fourth Section Order No. 124, basing the same upon its findings and conclusions contained in its report of the same date, and in and by this order authorized the petitioning carriers to establish and maintain on and after July 15, 1915, the carload rates proposed in their application and shown in the appendix to the report of January 29, 1915, on certain iron and steel articles described and designated specifically in the order.

The defendant railroad companies and other transcontinental carriers thereupon published and put into effect on July 15, 1915, in lieu of the 80 cent rate theretofore in effect on various iron and steel articles in carloads from Chicago and points taking the same rates to Pacific coast ports, a rate of 55 cents per 100 pounds for divers minimum weights and pursuant to the authority granted by the last mentioned order of the Interstate Commerce Commission higher rates to intermediate points of destination. This rate of 55 cents on iron and steel articles from Chicago and common points to Seattle and other Pacific coast terminals mentioned in the order of January 29, 1915, was published in Supplement No. 16 to Trans-Continental Freight Bureau West-Bound Tariff No. 4-L, I. C. C. No. 997 of R. H. Countiss, Agent, became effective July 15, 1915, has

33 remained in effect ever since and is now the lawful rate in effect. West-bound transcontinental rail routes to Pacific coast ports on iron and steel articles and many other commodities always have been controlled by competition with rates made by water carriers, and for many years both before and after the building of the transcontinental railroads to the Pacific coast commodities were transported from the eastern part of the United States to the Pacific coast by water either through the Straits of Magellan or across the Isthmus of Panama or the southern part of Mexico by the Tehuantepec Railroad to the Pacific coast and thence by water to final destination. The defendant railroad companies and other transcontinental carriers by rail reduced the rates in effect prior to July 15, 1915, on iron and steel articles and other Schedule C commodities in order to compete more effectively for traffic in the same with carriers by water from the Atlantic seaboard to the Pacific coast ports through the Panama Canal, which opened for traffic on August 15, 1914, and by means of which competition by water was intensified very greatly and to such an extent that it controlled rail rates and compelled the railroads to make the reductions aforesaid. The defendants named in paragraphs numbered IV to XIX hereof inclusive were parties to the above mentioned tariff and supplement and to all supplements thereto or re-issues thereof.

## XXII.

Thereafter on September 27, 1915, defendants Oregon-Washington Railroad and Navigation Company, Chicago, Milwaukee and St. Paul Railway Company, The Great Northern Railway Company,

34 Northern Pacific Railway Company and other rail carriers that were parties to Tariff 4-L and supplements thereto made to the Interstate Commerce Commission Fourth Section Application No. 10336 asking for authority to establish a rate of 55 cents per 100 pounds for divers minimum weights on certain specified iron and steel articles from Pittsburgh and common points, that is to say, points taking the same rate, to Pacific coast ports, including Seattle, without making such rate applicable to intermediate points of destination. At that time the Panama Canal was closed temporarily by slides of earth and rock and remained closed up to April

15, 1916, when these obstructions were removed so that ships could pass through the canal again.

After full hearing the Interstate Commerce Commission on March 1, 1916, made a report and order on this application, which report and order were in words and figures as follows, namely:

Interstate Commerce Commission.

Fourth Section Application No. 10336.

Rates on Iron and Steel Articles from Pittsburgh Territory to Pacific Coast Ports.

Submitted December 3, 1915; Decided March 1, 1916.

*Report of the Commission.*

By the Commission:

By the above-numbered application filed by R. H. Countiss, C. C. McCain, and E. Morris, agents, carriers parties to westbound transcontinental tariffs No. 1-N (I. C. C. Nos. 996, 15, and 478, respectively) and No. 4-L (I. C. C. Nos. 997, 16, and 479, respectively), ask for authority to establish a rate of 55 cents per 100 pounds on certain specified iron and steel articles from Pittsburgh and common points (group B) and from Cincinnati and common points (group C) territories to Pacific coast ports without making such rate applicable to intermediate points of destination.

In our report of January 29, 1915, respecting Commodity Rates to Pacific Coast Terminals, 32 I. C. C., 611, and in our amended report of April 30, 1915, respecting the same matter, 34 I. C. C., 13, the Commission authorized the carriers to establish a rate of 55 cents on certain iron and steel articles from Chicago and all points between Chicago and the Missouri River to Pacific coast ports with certain limitations respecting the rates to intermediate points of destination. At the time of the hearing in October, 1914, respecting the rates on the so-called schedule C commodities, the carriers explained that they contemplated extending the 55-cent rate on these articles from points as far east as Pittsburgh, and perhaps from the Atlantic seaboard, but at that time were unable to agree with their eastern connections concerning the divisions. The Commission acted upon the application as made and authorized the establishment of the rates from Chicago and other points of corresponding longitude. The application which is the subject of this report was filed on September 27, 1915. Authority is requested to extend the application of the 55-cent rate from territory east of Chicago as stated.

36 Protests against the application were filed by the American-Hawaiian Steamship Company and the Luckenbach Steamship Company, and they requested a hearing concerning the application. Hearing was held in November, 1915, and was attended

by representatives of the railroads, the steamship interests, and the shippers. Argument was had before the Commission in December, 1915, and the application now stands for disposition.

The carriers rested their claims for relief from the fourth section upon the testimony presented at Chicago in October, 1914, asserting that they had at that time established to the satisfaction of the Commission the necessity and justification for the relief sought.

The testimony taken at Chicago and the testimony offered at the hearing in November, 1915, by the Luckenbach Steamship Company show that the water rate from New York to Pacific coast ports on a majority of the important articles in this list was 30 cents per 100 pounds during the months of the year 1914 that the canal was open. In February, 1915, so much freight was being offered to boat lines that the three main steamship companies operating between the two coasts, the American-Hawaiian Steamship Company, the Luckenbach Steamship Company, and H. R. Grace & Company, began a systematic increase in many of their rates. These increases in water rates were said to be due in part to the fact that more freight was being offered to the boats than the boats in service could well carry,

and in part to a conviction upon the part of the water lines  
37 that they had unnecessarily depressed the rates between the two coasts. It is stated that the war conditions in Europe created a demand for ships in the trade between Europe and America heretofore unprecedented. Many of the smaller steamship companies which had sought to share in the business between the Atlantic and Pacific coasts of North America found more lucrative employment for their ships elsewhere.

The increases made in the coast to coast rates on these iron articles were very marked. By July 15, 1915, the rates on a majority of these articles that in the fall of 1914 moved by water at rates of 30 cents or less per 100 pounds were 40 cents per 100 pounds, and in some instances were 45 or 50 cents. This was the condition existing at the time the canal was closed by slides in September, preventing the passage of ships.

The conditions existing during the last three months of 1915 as to the rates by water between the two coasts are admitted to have been abnormal. The Tehuantepec Railroad is not available as a link in a through route on account of war conditions in Mexico. The Panama Railroad is not in condition to handle the traffic which the steamboat lines could bring to it. Many of the boats that had used the canal are not equipped with fuel capacity or are not of such seagoing character as to undertake the long and rather perilous route through the Straits of Magellan. Under these circum-

stances the rates were again increased by the boat lines on  
38 these articles to figures varying from 45 to 50 cents per 100 pounds, which are, so far as we are advised, the rates now in effect.

It is urged by the railroads that the 30-cent rate in effect in 1914 represents the normal water rate between the two coasts which the rail lines must be prepared to reckon with and that the substantial increases are due to abnormal conditions on account of the European war and the diversion of boats from the coastwise to the European



trade. On the other hand, the boat lines urge that the rates applied in 1914 by the boats were abnormally low and that the 40-cent rate more early represents the normal water rate on these articles.

The present rail rate on these articles from Pittsburgh to the Pacific coast is 73.9 cents per 100 pounds, made by combining the local rate of 18.9 cents Pittsburgh to Chicago with the 55-cent rate from that point to the coast.

The application is supported by the shippers in the Pittsburgh district and other districts that would benefit by the proposed rate. They urge that the 55-cent rate now in effect from Chicago gives to Chicago an undue advantage over Pittsburgh in the business on the Pacific coast. The application is also supported by the representative of the interests at Spokane, an intermediate point of destination. It is opposed by shippers of Chicago, who assert that their geographical location entitles them to a lower rate than Pitts-

burgh. It is also opposed by Atlantic seaboard shippers, who assert that a 55-cent rate from Pittsburgh will put the shippers on the Atlantic seaboard at a disadvantage.

It has been testified in this case that Pittsburgh is looked upon as the great pricemaking point for iron articles. It is asserted by witnesses in this case that, for example, the Seattle buyer of iron articles in the Chicago market pays for such articles in Chicago a price as much higher than the Pittsburgh price as the rate from Chicago to Seattle is lower than the rate from Pittsburgh to Seattle. The inevitable conclusion is that no consumer at the Pacific coast benefits by the reduction of rates on iron articles to the Pacific coast ports, unless such reductions apply from Pittsburgh.

It is possible that ultimately the Commission should authorize the establishment of the 55-cent rate from Pittsburgh in order to permit the movement of these articles by rail. The local rate Pittsburgh to New York on most of the important articles in this list is 16.9 cents per 100 pounds. A 30-cent rate from New York to the Pacific coast would attract a large percentage of this traffic to the boat lines as against a 55-cent rate all rail.

However, conditions have changed quite materially since the canal was opened, and under present conditions the 40-cent rate more nearly represents what the water competition now is, or is likely in the near future to be, than does the 30-cent rate.

It seems clear that ordinarily the Commission should not, by relief from the fourth section, authorize the carriers to go any further in meeting water competition than is necessary to meet the competition afforded by water routes, because to do so would give a permanent advantage to some localities to the disadvantage of competing localities. A 65-cent rate from Pittsburgh on these iron and steel articles under the conditions that existed during the year 1915 prior to the closing of the canal by slides would permit the movement of these articles via New York and water thence to the coast, and would permit also the movement of a considerable percentage of the traffic by rail.

It is impossible at this time to foretell the degree of competition which the water lines are likely to afford during the coming year.



It is asserted that it may be several years before boats will care to bid for this traffic strongly enough to offer a 30-cent rate from New York. When that time comes, if it ever does, the Commission can, if requested to do so, consider such proposed reductions in rates by rail as may be thought necessary to meet the situation. In authorizing the establishment of a rate of 65 cents from Pittsburgh to the Pacific coast we are permitting on this traffic only the same differences between the Pittsburgh and the Chicago rates to the Pacific coast that are now permitted on rates on these articles to intermediate points.

We shall, therefore, authorize these carriers to establish from Pittsburgh and points grouped therewith and from Cincinnati and points grouped therewith rates on these iron and steel articles of 65 cents per 100 pounds to the same Pacific coast ports to which we have authorized the establishment of the 55-cent rates from Chicago. The rates to intermediate points on these articles will be controlled by the requirements of our Fourth Section Order No. 124, of April 30, 1915. An appropriate order will be entered permitting the establishment of the rates authorized on five days' notice.

#### Fourth Section Order No. 5409.

At a General Session of the Interstate Commerce Commission, Held at Its Office, in Washington, D. C., on the 1st Day of March, A. D. 1916.

#### Fourth Section Application No. 10336.

#### Iron and Steel Articles from Pittsburgh Territory to Pacific Coast Ports.

By application No. 10336 of R. H. Countiss, C. C. McCain, and Eugene Morris, agents, carriers named therein ask for authority to establish a rate of 55 cents per 100 pounds on certain specified iron and steel articles from Pittsburgh and common points (group B), and from Cincinnati and common points (group C) territories to the Pacific coast ports, without making such rates applicable to intermediate points of destination. A hearing having been held upon this application, and full investigation of the matters and things involved therein having been had, and the Commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon which said report is hereby referred to and made a part hereof.

42 It is ordered, That the petitioners herein be, and they are hereby, authorized to establish rates of 65 cents per 100 pounds on the iron and steel articles named in the application from Pittsburgh and common points (group B) and from Cincinnati and common points (group C) territories to the Pacific coast ports named in amended Fourth Section Order No. 124, of April 30, 1915, and other orders supplementary thereto.

It is further ordered, That tariffs containing rates revised in accordance with the terms of this order may be made effective upon notice to the Interstate Commerce Commission and to the general public by not less than five days' filing and publishing in the manner prescribed in section 6 of the act to regulate commerce.

By the Commission.

[SEAL.]

GEORGE B. MCGINTY, *Secretary*.

By said order the petitioning carriers were authorized to establish and maintain from Pittsburgh and points grouped therewith to Pacific Coast ports (including Seattle) a rate of 65 cents per 100 pounds on certain iron and steel articles for divers minimum carload weights. The iron and steel articles included in this application were the same as those on which a rate of 55 cents became applicable from Chicago after July 15, 1915. The petitioning carriers published this rate of 65 cents effective April 10, 1916, in Supplement No. 4 to Trans-Continental Freight Bureau West-Bound Tariff No. 4-M, I. C. C. No. 1020, of R. H. Countiss, Agent, and have maintained this rate of 65 cents in effect ever since and the same is now the lawful rate for the transportation from Pittsburgh to Seattle of iron and steel articles in carloads for divers minimum weights.

The transcontinental carriers by rail reduced their rates in effect prior to April 10, 1916, on iron and steel articles in carloads from Pittsburgh to Pacific coast ports in order to compete more effectively for traffic in those commodities with carriers of the same by water from the Atlantic seaboard to the Pacific coast ports through the Panama Canal, which opened for traffic on August 15, 1914, and by means of which competition was intensified very greatly and to such an extent that it controlled the rail rates and compelled the railroads to reduce their rates from Pittsburgh from 80 cents to 65 cents as aforesaid. The defendants named in paragraphs numbered IV to XIX hereof inclusive were parties to the above mentioned Tariff 4-M and to Supplement No. 4 thereto, and to all supplements thereto or re-issues thereof.

### XXIII.

On April 1, 1916, the Interstate Commerce Commission made an order reopening certain Fourth Section Applications, including No. 10336, which order was in words and figures as follows, namely:

#### *Order.*

At a General Session of the Interstate Commerce Commission, Held at Its Office, in Washington, D. C., on the 1st Day of April, A. D. 1916,

44 Fourth Section Applications Nos. 205, 342, 343, 344, 349, 350, 352, 10336, 9813, 10063, 10110, 10126, 10155, 10186, 10189,

Whereas, by order of January 29, 1915, and supplemental order of April 30, 1915, and various other supplemental and amendatory

orders, the Commission authorized the establishment of certain rates from eastern defined territory to Pacific coast ports and intermediate points, applicable upon a designated list of commodities known as schedule C commodities, which originate in large part upon the Atlantic seaboard, are adapted to water transportation, and upon which the rates are relatively low;

And whereas further, the Commission is in receipt of petitions by the Nevada Railroad Commission and the Merchants' Association of Spokane, Wash., for a reopening of the Trans-Continental West-Bound Fourth Section Applications, alleging that changed conditions since the hearing with reference to the rates on schedule C commodities justify the Commission in modifying the relief afforded by their orders;

And whereas further, by Fourth Section Application No. 10336 the carriers sought authority to establish from Pittsburgh and other points taking the same rates, a rate of 55 cents per 100 pounds on certain designated iron articles;

And whereas further, the Commission by its Fourth Section Order No. 5409, responsive to that application, authorized the carriers to establish a rate of 65 cents per 100 pounds on the iron articles, above described, from Pittsburgh and group points to Pacific coast terminals;

And whereas further, by Fourth Section Application No. 45 9813, the Southern Pacific Company Atlantic Steamship Lines sought authority to establish a rate of 40 cents per 100 pounds on barley, beans, canned goods and asphaltum from Pacific coast ports to certain Atlantic seaboard points, and to continue higher rates from and to intermediate points;

And whereas further, the Commission, by its Fourth Section Order No. 4767, responsive to the application above named, authorized the petitioners to establish these relatively low rates from the Pacific coast and to continue higher rates from intermediate points;

And whereas further, as the result of certain other fourth section applications known as Fourth Section Applications Nos. 10063, 10110, 10126, 10155, 10186, 10189, the Commission authorized the establishment of rates on dried fruits and wine from Pacific coast ports to the Atlantic seaboard via the Southern Pacific Company-Atlantic Steamship Lines and the Atchison, Topeka & Santa Fe Railway and the Mallory Steamship Company, and the establishment of the 40-cent rates on barley, beans, canned goods and asphaltum from Pacific coast ports to the Atlantic seaboard via the Atchison, Topeka & Santa Fe Railway and the Mallory Steamship Company;

And whereas further, the petitioner on behalf of the Nevada Railroad Commission and the Spokane Merchants' Association, above referred to, assert that owing to slides in the Panama Canal and to the diversion of boats from the coast-to-coast traffic into other employment, the competition by water which necessitated the various orders above referred to has, in large part, disappeared;

46 Now therefore, it is ordered, That the Commission reopen for further hearing such portions of Fourth Section Applications Nos. 205, 342, 343, 344, 349, 350, 352 and 10336 as affect the rates upon the schedule C commodities, above referred to, and that a hearing be held before the Commission at Washington at 10 o'clock a. m., on April 24, 1916, respecting the changed conditions which are alleged in justification of a modification of the Commission's orders,

It is further ordered, That Fourth Section Applications Nos. 9813, 10063, 10110, 10126, 10155, 10186, 10189, respecting rates on barley, beans, canned goods, asphaltum, dried fruits and wine from Pacific coast ports to the Atlantic seaboard, be reopened and assigned for further hearing before the Commission at Washington on April 24, 1916, at which hearing testimony will be heard respecting the changed conditions urged in justification for a modification of the Commission's fourth section orders.

It is further ordered, That argument be had concerning all these applications immediately upon the close of the hearings above ordered.

By the Commission:

[SEAL.]

GEORGE B. MCGINTY, *Secretary*.

None of the carriers named as defendants in this suit and none of the carriers named as parties to Tariffs 4-L or 4-M above mentioned, or to any of the supplements thereto, applied to the Interstate Commerce Commission by petition or otherwise to reopen Fourth Section Application No. 10336 respecting rates on iron and steel articles from Pittsburgh and group points to Pacific

47 coast terminals or any of the other Fourth Section Applications mentioned in the order of April 1, 1916, and the Interstate Commerce Commission exceeded its jurisdiction and went beyond its lawful powers in making its order of April 1, 1916, purporting to reopen for further consideration Fourth Section Application No. 10336 and the other Fourth Section Applications therein specified. Nevertheless the Interstate Commerce Commission in pursuance of the order last mentioned proceeded to hold a hearing and to take testimony respecting changed conditions as a basis for a modification of its previous Fourth Section Orders. At the hearing last mentioned the defendant carriers and all the other transcontinental railroads oppose any change in the existing transcontinental rates west-bound from Chicago, Pittsburgh and other eastern defined territory on iron and steel articles and other schedule C commodities to Pacific coast ports, but the Spokane Merchants' Association and the Railroad Commission of Nevada appeared by their respective attorneys and introduced testimony to support their claim that by reason of the west-bound transcontinental rates in effect to Pacific coast ports the communities in the intermountain territory which they represented were discriminated against unjustly in violation of sections 2 and 3 of the act to regulate commerce, and this was the particular and sole matter submitted at the hearing for the consideration of the Interstate Commerce Commis-

sion. At that hearing no proposed increases in rates on any commodities whatsoever were considered and no schedules containing proposed increased rates had been filed with the Interstate Commerce Commission by any of the defendant carriers or transcontinental railroads. Nevertheless, the Interstate Commerce  
48 Commission after hearing testimony and argument in pursuance of its order of April 1, 1916, made on June 5, 1916, a report of its findings of fact and conclusions of law and an order based thereon, which report and order are in words and figures as follows, namely:

Interstate Commerce Commission.

In the Matter of Reopening Fourth Section Applications Nos. 205, 342, 343, 344, 349, 350, 352, 10336, 9813, 10110, 10123, 10155, 10186, and 10189.

Submitted April 26, 1916; Decided June 5, 1916.

*Report of Commission.*

By the Commission:

This proceeding is the result of two petitions, one filed on behalf of the Spokane Merchants' Association and the other by the Nevada Railroad Commission, asking the Commission to reopen for further consideration Fourth Section Applications Nos. 205, 342, 343, 344, 349, 350, and 352, filed on behalf of the transcontinental carriers, asking for fourth section relief as to commodity rates from eastern defined territory to Pacific coast points. These applications have been dealt with in Railroad Commission of Nevada v. S. P. Co., 21 I. C. C., 329; City of Spokane v. N. P. Ry. Co., 21 I. C. C., 400; and Commodity Rates to Pacific Coast Terminals, 32 I. C. C., 611; 34 I. C. C., 13. Through the reports and orders in these cases  
49 specific relief has been granted to the carriers, permitting them to continue lower rates to Pacific coast points than to intermediate points. The petitions filed on behalf of the Spokane Merchants' Association and by the Nevada Railroad Commission allege that by reason of slides in the Panama Canal and the increased demand for shipping which has arisen in consequence of the European war, the water competition, which has heretofore warranted certain relatively low rail rates from eastern defined territories to the Pacific coast has in large part disappeared. It is further alleged that under the circumstances now existing the maintenance of the present lower rates to the Pacific coast points than to intermediate territory has the effect of producing unjust and undue discrimination against intermediate points.

The Commission, therefore, by appropriate order, reopened the applications respecting westbound rates on commodities comprised within a list known as schedule C, described in Commodity Rates to Pacific Coast Terminals, supra, and Fourth Section Application

No. 10336, respecting rates on iron and steel articles from Pittsburgh and related points to Pacific coast terminals. The Commission also on its own motion reopened Fourth Section Applications Nos. 9813, 10110, 10126, 10155, 10186, and 10189, respecting rates on barley, beans, canned goods, asphaltum, dried fruits, and wine from California ports via rail-and-water routes through Gulf ports to the Atlantic seaboard. By our orders responsive to these applications rates have been authorized from California ports on these commodities to the Atlantic seaboard lower than those con-

50      temporarily applied from intermediate California points.

Hearing was ordered at Washington on April 24, 1916, before the Commission, with reference to such changed conditions as were alleged to make necessary or appropriate any change in the orders heretofore entered with respect to these applications.

It was shown at the hearing that the obstructions to canal traffic caused by the slides which from September, 1915, to April, 1916, had closed the Panama Canal, had in large part been removed, and that the canal was reopened on or about April 15, 1916. The two principal steamship companies, that formerly operated between the Atlantic and Pacific coasts via the canal, the American-Hawaiian Steamship Company and the Luckenbach Steamship Company through their principal traffic officers, announced that owing in part to the obstructions to passage through the canal which had rendered it impossible to use that route from September, 1915, to April, 1916, and in part to the unprecedentedly high rates which are now being offered for the transportation of many kinds of ocean freight, they had for the time being withdrawn all their ships from the coast to coast business and chartered many of them for other purposes for periods extending into the future from 3 to 18 months. The prices obtained for the use of these ships, whether by the month or by the voyage, were exceptionally high. So long as such rates can be obtained for ocean service between the United States and

foreign countries there is no doubt that the coast to coast  
51      business will be unattractive to steamship lines at the rates now obtainable. Both of these companies announced their intention ultimately to return to this service but stated that such return was unlikely before the end of the year 1916, and that the time of such return depended in part upon the measure of the rates they would be able to secure for this service in competition with the rail lines. The result of all the evidence offered was to show that there is not at this time any effective water competition between the two coasts and that there is little likelihood of any material competition by water during the present calendar year, irrespective of the action the Commission may take with respect to these petitions.

The rail carriers take the position that although the water competition has for the time being disappeared, the condition is but temporary, and the rates applied by the steamship lines during the first six months after the canal was opened are representative of the normal rates with which the rail lines must expect to compete if they hope to continue to haul any considerable percentage of the



business to and from the Pacific coast points. It was shown that the rates applied by the steamship lines on the schedule C commodities during the six months following the opening of the canal corresponded closely to the divisions of through rates on the same articles enjoyed by the American-Hawaiian Steamship Company

during the years preceding the opening of the canal when  
52 that company was operating via the Isthmus of Tehuantepec.

It appears that during these years of operation via the Isthmus the company was prosperous, built up its fleet, enlarged its business, and that this prosperity was founded upon the handling of business between the two coasts at rates which netted the company approximately the same revenue which it subsequently received for the through carriage of this traffic via the Panama Canal. It would seem that the rates at which traffic was taken by sea during the last half of the year 1914 were not materially lower than might reasonably have been expected at that time, and that such rates may perhaps again obtain when the normal conditions of ocean traffic shall have been restored. The rail rates, therefore, on these schedule C commodities and the water-and-rail rates via Galveston on the California products named when established were not lower than the conditions then existing warranted, if the rail lines were to continue to compete for this traffic with the ships. It is perfectly clear, however, that the conditions formerly existing have materially changed. The unprecedented freight rates which are being paid for ocean transportation between this and foreign countries have attracted to that service practically all of the ships, regular or irregular, which have been heretofore engaged in the coast to coast  
service. That the conditions with which we are confronted

53 are but temporary is admitted. How long such conditions will last is problematical. As the situation now stands, however, the rail rates on all these schedule C commodities from eastern defined territories to Pacific coast terminals are lower than the present conditions warrant, while at the same time higher rates are applied at intermediate points. The eastbound rates on California products from California ports to the Atlantic seaboard are also lower than present conditions warrant and lower than the rates applied from and to intermediate points. The rate adjustment in question was established after exhaustive hearing and careful study as to each of the commodities involved, and was justified by the conditions then existing. The war and an unparralleled rise in prices for ocean transportation have so changed the situation as to transform a relation of rates which was justified when established to one that is now unjustly discriminatory against intermediate points.

The representatives of the intermediate points urge that the conditions now existing, although unusual and probably temporary, will undoubtedly exist for a number of months to come, and that during this period the maintenance of these relatively low rates to coast points and higher rates to intermediate points constitutes undue preference in favor of the coast points and undue prejudice to intermediate points. The representatives of the coast cities, both

on the Atlantic and the Pacific coasts, and the representatives of many other shippers, urge that the present adjustment is the  
54 result of much labor and thought and that many contracts have been made predicated upon expectation of a continuation of the present rail rates, and that an increase of the present rates to the coast on these commodities will result in much hardship and loss to individual shippers, business firms, and communities. They urge also that the present state of affairs is but temporary and that by the time a readjustment of these rates can be effected a change in conditions may have come about which will render a return to the present rates necessary.

No change in rates such as is here sought should be made precipitately. Yet necessary and proper changes in rates must be effected from time to time, although such changes may result in hardship and loss. The coast cities also contend that as some of the rates to Pacific coast points and the rates on California products from the California ports to the Atlantic seaboard have been reduced since June 18, 1910, on account of water competition, they can not be again increased under the present circumstances because such increases are prohibited by that portion of the fourth section of the act as amended which reads as follows:

"Whenever a carrier by railroad shall in competition with a water route or routes reduce the rates on the carriage of any species of freight to or from competitive points, it shall not be permitted to increase such rates unless after hearing by the Interstate Commerce  
55 Commission it shall be found that such proposed increase rests upon changed conditions other than the elimination of water competition."

This section of the act must, of course, be construed in the light of the other sections, and in view also of the purpose and intent of this particular section. One of the primary purposes of the act to regulate commerce was to preserve and promote and not to destroy competition between carriers. The purpose of this clause was the preservation of water competition. It was intended to act as a restraint against rail carriers reducing their rates between competitive points to such a level as to render the water service between such points unremunerative and unattractive. Should a rail carrier operating a route between competitive points in competition with a water route depress its rates, without authority of the Commission, to a level so low as to drive the water carrier from the field, the rail carrier is prohibited from thereafter increasing its rates except by permission of this Commission, and such permission can not be extended unless reasons for the proposed increases are shown other than the elimination of the water competition. In the situation here considered, however, the carriers sought authority from this Commission to make the reductions which have been made. Hearings were held and careful examination was made of each  
56 proposed rate, both to the coast points and to and from intermediate points. The Commission had to determine the following facts:



(1) Were the proposed rates to the coast points warranted by the competition there existing?

(2) Were the lower terminal rates proposed such as to more than cover the out of pocket costs of the rail carriers that performed the service?

(3) Were the higher rates proposed to intermediate points and in the case of the eastbound rates from intermediate points reasonable per se and not unjustly discriminatory against such points?

The first two questions being answered in the affirmative by the testimony offered, the Commission itself fixed the relative measure of the rates to intermediate points in the case of the westbound rates and authorized the relative measure of the rates from intermediate points proposed by the carriers in the case of the eastbound rates under the conviction that the rates to and from intermediate points so proposed did not unjustly discriminate against such points. The carriers have proceeded in this case under the authority of the Commission to make only such rates to the coast points as would enable them to compete for and share in this traffic, and the withdrawal of boats from this service has not been on account of the rates made by the rail carriers with which the boats compete, but on account of slides in the Panama Canal and the extraordinary rise in ocean freights. The temporary withdrawal of the canal service in this instance is clearly not the result of any act of the carriers or of this Commission.

If, however, in the exercise of our judgment upon the facts presented in this case we had permitted the rail carriers to establish lower rates to the coast points than the actual competition there existing warranted, and upon hearing with proper notice to all interested parties it was subsequently shown that the effect of our order was to permit the continuance of rates to such points lower than were warranted by competition there existing, shall it be said that this condition must be perpetuated? To continue rates to the coast points that are lower than are necessitated by the actual water competition and higher rates to intermediate points and to other points, over similar distances under like circumstances, is to perpetuate a discrimination that is unjust. The second and third sections of the act forbid all unduly preferential or unjustly discriminatory rates and practices. The portion of the fourth section above quoted does not repeal or annul any part of the second and third sections of the act to regulate commerce. If a coast point is receiving a lower rate than that to which it is lawfully entitled by the conditions there existing it is a preference at that point that results in prejudice against higher rated points whether intermediate thereto or not. Furthermore, the primary purpose of this portion of the fourth section being to preserve and promote competition by the water carriers, it must be so construed as to give effect to that purpose. If the rail rates between the two coasts, established in the light of conditions then existing, should, through such a complete change of conditions as that which has so recently come about, be now at a level so low as to make the service between the two coasts unattractive to the boat lines, should they be readjusted

to a basis that will attract the water carriers back to the service and the primary purpose of the section be achieved or should they be held at the present level and the legislative purpose to a certain extent be defeated?

That portion of the fourth section which provides that—

“the Commission may from time to time prescribe the extent to which the carrier may be relieved from the requirements of this section”—

seems to contemplate a certain flexibility in the rates at the competitive points varying with the degree of competition there found, in connection with which rates relief may be afforded according to the degree and extent of the competition. It is admitted that the present rates upon schedule C articles from eastern defined territories to Pacific coast points, and the rates on  
59      barley, beans, canned goods, asphaltum, dried fruits, and wine from California ports to the Atlantic seaboard are lower than the present competition by water justifies or makes necessary. The maintenance of these low rates to the coast points and higher rates to or from intermediate points has the effect under present circumstances of unduly preferring the coast points and unjustly discriminating against intermediate points. This condition has existed for several months. The recent withdrawal of the principal steamship lines, however, and their contracts for use in other lines of service creates a probability that there will be but little effective water service during the current year and perhaps for a considerable period thereafter. We shall, therefore, rescind, effective September 1, 1916, those portions of our orders relating to the schedule C commodities and require that the rates on these commodities from eastern defined territories to Pacific Coast terminals be adjusted effective on that date in accordance with the terms of our order respecting the schedule B commodities. The order responding to application No. 10336 respecting rates on iron and steel articles from Pittsburgh and related points will likewise be rescinded, effective September 1, 1916. We shall rescind, effective September 1, 1916, our orders responding to applications Nos. 9813, 10110, 10126, 10155, 10186, and 10189 respecting rates on California products from California ports via Gulf routes to the Atlantic seaboard. The rates on these articles eastbound must be readjusted in strict accord with the requirements of the fourth section, except in so far as any of them were by order permitted to deviate from the requirements of the fourth section of the act prior to the establishment of the present effective terminal rates eastbound. If conditions should again  
60      materially change so as to justify such action, petitions for further orders may be presented and they will be dealt with as the circumstances then appearing may warrant.

*Order.*

At a General Session of the Interstate Commerce Commission, Held at Its Office, in Washington, D. C., on the 5th Day of June, A. D. 1916.

In the Matter of Reopening Fourth Section Applications 205, 342, 343, 344, 349, 350, 352, and 10336, filed by R. H. Countiss, Agent, on behalf of various transcontinental carriers for authority to continue lower rates on certain commodities from eastern Defined territory to Pacific Coast ports than the rates contemporaneously applicable on like traffic to intermediate points, and In the Matter of Reopening Fourth Section Applications 9813, 10110, 10126, 10155, 10186 and 10189, filed by R. H. Countiss, Agent, on behalf of the Southern Pacific Company Atlantic Steamship Lines, The Atchison, Topeka & Santa Fe Railway Company, and Mallory Steamship Company respecting rates on barley, beans, canned goods, asphaltum, dried fruit, and wine from California ports to points on the Atlantic Seaboard which are lower than the rates contemporaneously applicable from intermediate points.

A public hearing having been held and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is ordered, That the relief afforded from the requirements of the fourth section by our Fourth Section Order No. 61 124, of April 30, 1915, and Fourth Section Order No. 5409, of March 1, 1916, respecting the rates on schedule C commodities named in Commodity Rates to Pacific Coast Terminals, 32 I. C. C., 611, be, and it is hereby, rescinded, effective September 1, 1916.

It is further ordered, That the petitioners named in the above-described applications be, and they are hereby, authorized to readjust, effective September 1, 1916, the rates on the schedule C commodities from eastern defined territory to Pacific coast ports and intermediate points, in accordance with the requirements of Fourth Section Order No. 124, of April 30, 1915, as to commodities other than those listed under schedule C.

It is further ordered, That all other and further relief as to the rates on schedule C commodities be, and it is hereby, denied, effective September 1, 1916.

It is further ordered, That Fourth Section Orders Nos. 4767, 5012, 5088, and 5099, respecting rates on barley, beans, canned goods, asphaltum, dried fruits, and wine, from California ports via rail and water routes to the Atlantic seaboard, be, and they are hereby, rescinded, effective September 1, 1916.

It is further ordered, That in the readjustment of rates which may be filed responsive to this order, all increases in rates shall become

effective only after 30 days' filing and posting in the manner prescribed in section 6 of the act to regulate commerce.

By the Commission.

[SEAL.]

GEORGE B. MCGINTY, *Secretary*.

62      Thereafter on July 13, 1916, the Interstate Commerce Commission made an amended order based upon the findings of fact and conclusions of law contained in its report of June 5, 1916, which amended order is in words and figures as follows, namely:

*Amended Order.*

At a General Session of the Interstate Commerce Commission, Held at Its Office in Washington, D. C., on the 13th day of July, A. D. 1916.

In the Matter of Reopening Fourth Section Applications 205, 342, 343, 344, 349, 350, 352, and 10336, filed by R. H. Countiss, Agent, on behalf of various trans-continental carriers for authority to continue lower rates on certain commodities from eastern defined territory to Pacific Coast ports than the rates contemporaneously applicable on like traffic to intermediate points, and In the Matter of Reopening Fourth Section Applications 9813, 10110, 10126, 10155, 10186, and 10189, filed by R. H. Countiss, Agent, on behalf of the Southern Pacific Company Atlantic Steamship Lines, The Atchison, Topeka & Santa Fe Railway Company, and Mallory Steamship Company respecting rates on barley, beans, canned goods, asphaltum, dried fruit, and wine from California ports to points on the Atlantic Seaboard which are lower than the rates contemporaneously applicable from intermediate points.

Upon further consideration of the matters and things involved in the above-numbered applications,

It is ordered, That the order issued in the above-entitled proceeding under date of June 5, 1916, be, and the same is hereby, amended to read as follows:

63      A public hearing having been held and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is ordered, That the relief afforded from the requirements of the fourth section by our Fourth Section Order No. 124, of April 30, 1915, and Fourth Section Order No. 5409, of March 1, 1916, respecting the rates on schedule C commodities named in Commodity Rates to Pacific Coast Terminals, 32 I. C. C., 611, be, and it is hereby, rescinded, effective September 1, 1916.

It is further ordered, That the petitioners named in the above-described applications be, and they are hereby, authorized to readjust effective September 1, 1916, the rates on the schedule C commodities from eastern defined territory to Pacific coast ports and intermediate

points, in accordance with the requirements of Fourth Section Order No. 124, of April 30, 1915, as to commodities other than those listed under schedule C.

It is further ordered, That with respect to the rates on all commodities the Pacific coast terminals shall consist of San Diego, Wilmington, East Wilmington, San Pedro, East San Pedro, Redondo Beach, San Francisco and Oakland, Cal.; Astoria and Portland, Oreg.; Bellingham, South Bellingham, Everett, Vancouver, Aberdeen, Anacortes, Hoquiam, Cosmopolis, Tacoma and Seattle, Wash., only.

It is further ordered, That all other and further relief as to the rates on schedule C commodities be, and it is hereby denied, effective  
64 September 1, 1916.

It is further ordered, That Fourth Section Orders Nos. 4767, 5012, 5088, and 5099, respecting rates on barley, beans, canned goods, asphaltum, dried fruits, and wine, from California ports via rail and water routes to the Atlantic seaboard, be, and they are hereby, rescinded, effective September 1, 1916.

It is further ordered, That in the readjustment of rates which may be filed responsive to this order, all increases in rates shall become effective only after 30 days' filing and posting in the manner prescribed in section 6 of the act to regulate commerce.

By the Commission:

[SEAL.]

GEORGE B. MCGINTY, *Secretary*.

## XXIV.

Thereafter the defendants named in paragraphs IV to XIX hereof inclusive and other rail carriers parties to Tariffs 4-L and 4-M and the supplements thereto in pretended compliance with the requirements of the Interstate Commerce Commission's order of June 5, 1916, and amended order of July 13, 1916, respecting the so-called schedule C commodities issued on July 28, 1916, Supplement No. 11 to Tariff 4-M above referred to, which supplement is noted to become effective September 1, 1916. Supplement No. 11 publishes increased rates on divers iron and steel articles from Pittsburgh, Chicago and all points in the United States east of the Missouri River to Pacific coast ports, including Seattle, by reason of which on and after September 1, 1916, the rates thereon will be 94 cents per 100 pounds for divers minimum  
65 carload weights.

The increases proposed on iron and steel articles generally from Pittsburgh amount to 29 cents per 100 pounds, or approximately 45 per cent of the present rate of 65 cents. The increases from Chicago amount to 39 cents per 100 pounds, or approximately 70 per cent of the present rate of 55 cents. These increased rates on iron and steel articles are shown on pages 27 to 34 inclusive of Supplement No. 11 opposite Items Nos. 752-B, 758-A, 760-A, 766-A, 768-A, 772-A, 776-A, 780-A, 785, 785 1/4, 785 1/2, 785 3/4, 794-A, 796-A, 798-A, 800-A, 801, 804-A, 806-A, 808-A, 812-A, 815, 818-A, 826-A, 832-A, 834-A, 850-A, 853 and 854-A.

## XXV.

Your petitioner is engaged and since February, 1916, has been engaged at Seattle, Washington in the building and construction of steel ships. The ship-yard of your petitioner covers between eight and nine acres of ground fronting on Puget Sound, a navigable arm of the Pacific Ocean. Your petitioner now has under construction upon the ways at its ship-yard three steel ships. The capacity of your petitioner's ship-yard is three ships under simultaneous construction. The raw material used by your petitioner in the construction of its ships consists largely of steel plates, shapes, bars and rivet rounds. The principal market in the United States for commodities of this character, namely, iron and steel articles, is in and around Pittsburgh, Pennsylvania, and your petitioner was compelled to buy its raw materials in that market in order to obtain them in large quantities for the earliest possible deliveries. Your petitioner purchases its steel f. o. b. cars at Pittsburgh and ships the same over the lines of railroad of the defendant carriers, whose charges 66 for the transportation of the same are borne by your petitioner. Your petitioner prior to July 28, 1916, contracted to purchase in Pittsburgh and other points in Pennsylvania approximately 25,000 tons of steel plates, shapes, bars, rivet rounds and miscellaneous iron and steel articles. The seller is not obligated by these contracts to make deliveries prior to September 1, 1916, and your petitioner is and will be unable to obtain delivery of any part thereof prior to September 1, 1916. The demand for steel has been so great for the past year that the manufacturers thereof would not agree to sell plates and other raw material above mentioned to your petitioner except for deliveries far in the future, running from six months to over a year after the date of the contract. Your petitioner has undertaken and agreed to build, sell and deliver during the years 1916 and 1917 certain completed ships, and the 25,000 tons of material above mentioned were and are required for the construction of said ships. If the proposed increased rates on iron and steel go into effect on September 1, 1916, your petitioner will be compelled to pay in transportation charges on material to be delivered after that date approximately \$145,000 more than the charges it would be compelled to pay computed upon the basis of the rates now in effect. No ships are engaged in coast to coast traffic by water through the Panama Canal at the present time and it is wholly impossible for your petitioner to obtain the transportation by water of the material which it is under contract to purchase for delivery after September 1, 1916.

67

## XXVI.

The Interstate Commerce Commission by the provisions of section 15 of the act to regulate commerce is authorized, whenever there shall be filed with it any schedule stating a new rate, to enter upon a hearing concerning the propriety of such rate, and pending such

hearing and a decision thereon to suspend the operation of such schedule and defer the use of such rate, and after full hearing to make such order in reference to such rate as would be proper in a proceeding initiated after the rate had become effective. Section 15 further provides that at any hearing involving a rate increased after January 1, 1910, the burden of proof to show that the proposed increased rate is just and reasonable shall be upon the common carrier. Your petitioner on August 4, 1916, forwarded by telegraph to the Interstate Commerce Commission complaint requesting the Commission to enter upon a hearing concerning the propriety of the proposed increased rates on iron and steel articles published in Supplement No. 11, and pending such hearing and a decision thereon to suspend the operation of Supplement No. 11 in so far as the items showing increased rates on iron and steel articles were concerned, which complaint and request for suspension were in words and figures as follows, namely:

*Night Letter.*

Seattle, Washington,

August 4, 1916.

Interstate Commerce Commission, Washington, D. C.

Undersigned is Washington corporation, principal place of business Seattle, engaged in building steel ships, buys raw material consisting largely of steel plates, shapes, bars, rivet rounds, principally in Pittsburgh, some in Harrisburg and Johnstown, Penn. Has outstanding contracts to purchase approximately twenty-five thousand tons for delivery after September first, nineteen sixteen. Contracts all provide amount of any increase in freight shall be added to prices material thereafter shipped. Undersigned was compelled to make contracts subject to possible increases in freight rate; conditions in steel industry such for almost year that contracts to purchase could be made only for very distant deliveries running from six months to over year after date of contract. Undersigned requests suspension pending hearing supplement eleven to west bound traffic four M Countiss number ten twenty effective September first, nineteen sixteen, items numbers seven fifty-two B, seven sixty A, seven sixty-eight A, seven seventy-six A, seven eighty A, eight naught four A, eight naught six A, eight naught eight A, eight fifteen, eight sixteen A, eight fifty-three, eight fifty-four A, eight sixty-eight A. Items protested substantially increase present rates and increases proposed violate last paragraph fourth section because present rates on schedule C commodities to coast cities were reduced in competition with water routes water competition has been eliminated, and no hearing has been had by commission to determine whether proposed increases rest upon changed conditions other than elimination of water competition. Increases proposed do not rest on changed conditions other than elimination water competition. Increases amount to



69      practically forty-five per cent of present rate. Loss to under-  
signed on outstanding contracts solely from increased rates  
protested will approximate one hundred forty-five thousand dollars.

SKINNER & EDDY CORPORATION.

Meanwhile on August 2, 1916, the Interstate Commerce Commission issued a notice in words and figures as follows, namely:

Interstate Commerce Commission.

Office of Secretary.

Washington.

George B. McGinty, Secretary.

August 2, 1916.

DEAR SIR: The Commission has received numerous protests against and requests for suspension of certain tariffs issued and filed by R. H. Countiss as agent for the Trans-Continental carriers, naming increased commodity rates effective September 1, 1916, between Pacific Coast Terminals and intermediate points on the one hand and Eastern points on the other hand, and purporting to be in response to the Commission's Intermountain Fourth Section Orders. Many of these protests also request the Commission to name a date prior to September 1, 1916, on which protestants can appear before the Commission's representatives for the purpose of orally presenting their objections to the proposed increased rates, and representatives of the carriers have requested an opportunity to explain the proposed adjustment to the Commission's representatives.

70      In response to these requests an informal conference of all  
interested parties will be held before the Commission's Board  
of Suspension at 10 a. m., August 14, 1916, at the office of the  
Commission in the City of Washington, D. C.

Respectfully,

GEORGE B. MCGINTY, *Secretary*.

Pursuant to this notice the Interstate Commerce Commission held in Washington an informal conference at which your petitioner was represented by its attorney in support of its aforesaid protest against the proposed increased rates on iron and steel articles. The Interstate Commerce Commission has not granted your petitioner's request for a suspension of Supplement No. 11 in so far as the same published increased rates on iron and steel articles.

## XXVII.

Section 4 of the act to regulate commerce as amended June 18, 1910, provides:

"Whenever a carrier by railroad shall in competition with a water route or routes reduce the rates on the carriage of any species of



freight to or from competitive points, it shall not be permitted to increase such rates unless after hearing by the Interstate Commerce Commission it shall be found that such proposed increase rests upon changed conditions other than the elimination of water competition."

The Panama Canal was closed by slides, as aforesaid, at the time the rail carriers applied on September 27, 1915, to the Interstate Commerce Commission for authority to publish and maintain a rate of 55 cents on iron and steel from Pittsburgh to Pacific coast terminals without making the rate applicable to intermediate points. So it was on March 1, 1916, when the Interstate Commerce Commission permitted a rate of 65 cents to be established from Pittsburgh to the Pacific coast and higher rates to intermediate points and during the intervening period. So it was also on April 10, 1916, when the 65 cent rate to the Pacific coast became effective as aforesaid in pursuance of the authority granted by the order of the Interstate Commerce Commission dated March 1, 1916, and during the intervening period. So it was also on April 1, 1916, when the Interstate Commerce Commission made its aforesaid order reopening for further consideration Fourth Section Application No. 10336 and certain other Fourth Section Applications. On or about April 15, 1916, the obstructions caused by slides of earth and rock in the Panama Canal were removed, and thereafter the canal was opened for ships. During the period from September 27, 1915, to April 15, 1916, actual, substantial competition by water for the carriage of transcontinental traffic through the canal was eliminated wholly and entirely.

The Panama Canal was open for traffic on April 24, 25 and 26, 1916, on which dates the Interstate Commerce Commission held hearings in Washington upon reopened Fourth Section Application No. 10336 and other Fourth Section Applications to determine whether changed conditions required any modification of its previous orders upon these applications, but on these dates actual, substantial competition by water through the Panama Canal was eliminated to the same extent as it had been during the period from September 27, 1915, to April 15, 1916. So on June 5, 1916, when the Interstate Commerce Commission made its aforesaid report and order, and on July 13, 1916, when the Interstate Commerce Commission made its amended order based upon its report of June 5, 1916, the Panama Canal was open for traffic, but actual, substantial competition by water through the canal was eliminated at those times to the same extent as it was on September 27, 1915, and on March 1, 1916. So on July 28, 1916, when Supplement No. 11 to Tariff 4-M was issued the Panama Canal was open for traffic, but actual, substantial competition by water through the canal was eliminated to the same extent as it was on September 27, 1915, and on March 1, 1916. The increases in rates proposed in Supplement No. 11 to Tariff 4-M on schedule C commodities, including iron and steel articles, from Pittsburgh and other eastern defined territory to Pacific coast ports do not rest on

changed conditions other than the elimination of water competition in the situation with respect to the transportation of west-bound trans-continental traffic, and no changes in conditions with respect to the transportation of this traffic other than the elimination of water competition have taken place since July 15, 1915, when the rate of 55 cents on iron and steel to Pacific coast ports became effective from Chicago, and since April 10, 1916, when the rate of 65 cents from Pittsburgh to Pacific coast ports on iron and steel became effective.

No hearing has been held by the Interstate Commerce Commission to determine whether the increased rates published in Supplement No. 11 to Tariff 4-M to Pacific coast ports rest upon changed conditions other than the elimination of water competition. Nevertheless the Interstate Commerce Commission by its order of June 5, 1916, and its amended order of July 13, 1916, undertook to authorize the defendant carriers and other transcontinental railroads

73 to increase their rates on schedule C commodities from eastern defined territory to Pacific coast ports in violation of the last paragraph of section 4 of the act to regulate commerce, and the orders so far as they authorized or permitted the rail carriers to increase their west-bound transcontinental rates to Pacific coast ports without a prior hearing by the Commission to determine whether such proposed increases rested upon changed conditions other than the elimination of water competition were and are wholly void. The defendant carriers are parties to Tariff 4-M and to Supplement No. 11 thereof, and unless restrained by a decree of this court will exact and collect on and after September 1, 1916, from your petitioner for the transportation of iron and steel articles in carloads from Pittsburgh to Seattle rates of 94 cents per 100 pounds in lieu of the present rates of 65 cents per 100 pounds, and your petitioner will be compelled to pay the charges so exacted. Unless the orders of June 5, 1916, and of July 13, 1916, of the Interstate Commerce Commission so far as they permitted the defendant carriers and other transcontinental railroads to increase their west-bound rates on schedule C commodities, including iron and steel articles, be set aside, and unless the defendant rail carriers be restrained from putting into effect and thereafter collecting and exacting the increased rates on iron and steel articles in carloads from Pittsburgh to Pacific coast ports, your petitioner will suffer great and irreparable injury and damage, and enormous and ruinous financial loss will result to its business enterprise above mentioned, to the manifest wrong and injury of your petitioner, which has no plain, speedy or adequate remedy at law in the premises.

74 Your petitioner therefore prays that upon the filing of this petition a temporary or interlocutory order be made herein suspending the orders of June 5, 1916, and of July 13, 1916, of the Interstate Commerce Commission and restraining the enforcement thereof so far as the same permit the transcontinental rail carriers to increase their west-bound rates on iron and steel articles in carloads from Pittsburgh to Pacific coast ports, and restraining the defendant railroad companies from collecting or exacting on and after September 1, 1916, the increased rates on iron and steel articles in

carloads from Pittsburgh to Pacific coast ports published in Supplement No. 11 to Tariff 4-M or any rates thereon in excess of the rates now in effect until the Interstate Commerce Commission shall have held a hearing to determine whether the proposed increases rest upon changed conditions other than the elimination of water competition, and restraining the Interstate Commerce Commission and the defendant railroad companies from taking any steps or instituting any proceedings to enforce that portion of the orders of June 5, 1916, and July 13, 1916, relating to west-bound rates on iron and steel articles, and that upon the final hearing of this cause a decree be made herein setting aside and annulling the last mentioned orders of the Interstate Commerce Commission so far as they permit the transcontinental rail carriers to increase rates on iron and steel articles to Pacific coast ports and perpetually enjoining the enforcement of that part of the orders and perpetually enjoining the defendants, their agents, servants and representatives and the defendant railroad companies from enforcing the orders in the

75 respect complained of, and from charging, collecting or exacting from your petitioner the proposed increased rates on iron and steel articles from Pittsburgh to Seattle.

Your petitioner further prays that if any delay should intervene between the filing of this petition and the issuance of a temporary or interlocutory order as prayed for herein, an order be made suspending the operation of the orders of the Interstate Commerce Commission of June 5, 1916, and of July 13, 1916, and enjoining the enforcement thereof so far as they authorized increased rates on iron and steel articles on and after September 1, 1916, and the increasing by the defendant carriers of rates on iron and steel articles in carloads from Pittsburgh to Pacific coast ports until a final hearing and determination of the application for a temporary or interlocutory order prayed for herein, and your petitioner further prays that such other and further relief be granted in the premises as justice and equity may require.

Your petitioner further prays that your Honors grant unto your petitioner a writ of subpoena of the United States of America, and that due service thereof be made upon the defendants and upon the Interstate Commerce Commission, commanding them at a certain day and under a certain penalty therein to be specified to appear before this Court and then and there full, true and complete answer make to all and singular the premises; but not under oath (an answer under oath being hereby expressly waived), and to stand and abide such order and decree herein as to the Court shall seem meet and agreeable to equity and good conscience.

JOSEPH N. TEAL,

WILLIAM C. McCULLOCH,

*Solicitors for Petitioner.*

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TEAL, MINOR AND WINFREE,

*Portland, Oregon;*

L. B. STEDMAN, *Seattle, Washington;*

W. E. CREED, *San Francisco, California,*  
*Of Counsel.*

STATE OF WASHINGTON,  
*County of King, ss:*

I, D. E. Skinner, being first duly sworn according to law, depose and say: I am the president of Skinner and Eddy Corporation, the petitioner in the above entitled suit. I have read the foregoing petition and am familiar with the contents thereof, and the same is true to my knowledge.

D. E. SKINNER.

Subscribed and sworn to before me this 21st day of August, 1916.

[SEAL.]

BENJ. K. DAVIS,  
*Notary Public in and for Washington,  
Residing at Seattle.*

My commission will expire Feby. 24, 1920.

Filed August 21, 1916. G. H. Marsh, Clerk.

77 And afterwards, to wit, on Wednesday, the 23rd day of August, 1916, the same being the 44th Judicial day of the Regular July, 1916, Term of said Court; present the Honorable Charles E. Wolverton United States District Judge, presiding, the following proceedings were had in said cause, to-wit:

78 *Return on Service of Writ.*

UNITED STATES OF AMERICA,  
*District of Oregon, ss:*

I hereby certify and return that I served the Order to show cause on the therein-named Pennsylvania Co. by handing to and leaving a true and correct copy thereof together with the copy of the Petition with John S. Campbell as District Freight & Passenger Agent for the above named Company personally at Portland in said District on the 23rd day of August, A. D. 1916.

JOHN MONTAG,

*U. S. Marshal,*

By G. E. JACKSON, *Deputy.*

79 Compared and Corrected. V. J.—G. H. M.

In the District Court of the United States for the District of Oregon.

In Equity.

No. 7229.

SKINNER AND EDDY CORPORATION, Petitioner,

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, The Baltimore and Ohio Railroad Company, Bessemer and Lake Erie Railroad Company, Chicago, Burlington and Quincy Railroad Company, Chicago and Northwestern Railway Company, Chicago, Milwaukee and St. Paul Railway Company, The Great Northern Railway Company, Illinois Central Railroad Company, The New York Central Railroad Company, The New York *York*, Chicago and St. Louis Railroad Company, Northern Pacific Railway Company, Oregon Short Line Railroad Company, Oregon-Washington Railroad and Navigation Company, Pennsylvania Company, The Pittsburg and Lake Erie Railroad Company, The Pittsburg, Cincinnati, Chicago and St. Louis Railway Company, and Union Pacific Railroad Company, Defendants.

*Order to Show Cause.*

Upon reading and considering the verified petition herein, good cause appearing therefor, it is

Ordered that jurisdiction of this cause is assumed and the petition is sanctioned and directed to be filed in the office of the clerk of this court, and it is

Ordered further that the defendants named in the petition and each of them are commanded and required to appear before this Court on August 31, 1916 at ten o'clock in the forenoon or as soon

thereafter as counsel can be heard, at the United States

80 court-room in the city of Portland, State and District of Oregon, then and there to show cause, if any they can, why a restraining order and injunction should not issue against them as prayed in the petition, and it is

Ordered further that at least five days' notice of this hearing shall be given by petitioner's solicitors to the defendants, which notice may be by telegraph, and it is

Ordered further that the petition and this order be served upon each of the defendants by delivering copies thereof certified by petitioner's solicitors to any officer or agent of the respective defendants within the State and District of Oregon or within the District of Columbia, provided that such service, if it be made within the District of Columbia shall be made by the Marshal of the Supreme Court of the District of Columbia.

Dated and signed at Newport, in the State and District of Oregon this 21st day of August, 1916.

CHAS. E. WOLVERTON,  
*District Judge.*

Filed August 23, 1916. G. H. Marsh, Clerk.

81 And afterwards, to wit, on the 23rd day of August, 1916, there was issued out of said Court a Subpœna ad Respondendum to The Baltimore and Ohio Railroad Company, in words and figures, as follows, to wit:

82 Served a copy of the within subpœna together with printed copy of the petition and typewritten copy of a rule to show cause in said case dated August 21, 1916, certified by the attorney for the petitioner upon the within named defendant by the delivery of said copies to Samuel B. Hege, at his office address, the said party being the agent designated by said defendant to the Interstate Commerce Commission as the person upon whom service of process shall be made under the provisions of Section 6 of the Act of Congress, June 18, 1910, entitled An Act to Create a Commerce Court etc. this 29th day of August 1916.

MAURICE SPLAIN,  
*U. S. Marshal, District of Columbia.*  
R.

83 In the District Court of the United States for the District of Oregon.

No. 7229.

SKINNER AND EDDY CORPORATION, Petitioner,

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, The Baltimore and Ohio Railroad Company, Bessemer and Lake Erie Railroad Company, Chicago, Burlington and Quincy Railroad Company, Chicago and North-Western Railway Company, Chicago, Milwaukee and St. Paul Railway Company, The Great Northern Railway Company, Illinois Central Railroad Company, The New York Central Railroad Company, The New York, Chicago and St. Louis Railroad Company, Northern Pacific Railway Company, Oregon Short Line Railroad Company, Oregon-Washington Railroad and Navigation Company, Pennsylvania Company, The Pittsburgh and Lake Erie Railroad Company, The Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company, and Union Pacific Railroad Company, Defendants.

*Subpoena ad Respondendum.*

The President of the United States of America to the Baltimore and Ohio Railroad Company, Greeting:

You, and each of you, are hereby commanded that you be and appear in said District Court of the United States, for the District of Oregon, at the Court room thereof, in the City of Portland, in said District, to answer the exigency of a Bill of Complaint exhibited and filed against you in our said Court, wherein Skinner and Eddy Corporation is complainant, and you are defendant, and further to do and receive what our said District Court shall consider in this behalf, and this you are in no wise to omit under the pains and penalties of what may befall thereon.

And this is to command you, the Marshal of said District, or of any other District in the United States, or your Deputy, to make due service of this our Writ of Subpoena and to make due return of the same with your proceedings thereon into this Court within twenty days from this date.

Hereof fail not.

Witness the Honorable Charles E. Wolverton and the Honorable Robert S. Bean, Judges of said Court, and the Seal thereof affixed at Portland, in said District, this 23rd day of August, 1916.

[SEAL.]

G. H. MARSH, *Clerk*,  
By F. L. BUCK,  
*Deputy Clerk*.

MEMORANDUM.—Pursuant to Equity Rule No. 12 of the Supreme Court of the United States:

The defendant is required to file his answer or other defense in the clerk's office on or before the twentieth day after service, excluding the day thereof; otherwise the bill may be taken pro confesso.

Returned and filed September 11, 1916.

G. H. MARSH, *Clerk*.

84      Afterwards, to wit, on the 23rd day of August, 1916, there was issued out of said Court a Subpoena ad Respondendum to the Bessemer and Lake Erie Railroad Company, in words and figures, as follows, to wit:

85      Served a copy of the within subpoena together with a printed copy of the petition and typewritten copy of a rule to show cause in said case dated August 21, 1916, certified by the attorney for the petitioner upon the within named defendant by the delivery of said copies to W. N. Akers, at his office address, the said party being the Agent designated by said defendant to the Interstate Commerce Commission as the person upon whom service of process shall be made under the provisions of Section 6 of the



Act of Congress, June 18th, 1910, entitled An Act to Create a Commerce Court etc. this the 29th day of August 1916.

MAURICE SPLAIN,  
*U. S. Marshal, District of Columbia,*  
R.

86 In the District Court of the United States for the District of Oregon.

No. 7229.

SKINNER AND EDDY CORPORATION, Petitioner,

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, The Baltimore and Ohio Railroad Company, Bessemer and Lake Erie Railroad Company, Chicago, Burlington and Quincy Railroad Company, Chicago and North-Western Railway Company, Chicago Milwaukee and St. Paul Railway Company, The Great Northern Railway Company, Illinois Central Railroad Company, The New York Central Railroad Company, The New York, Chicago and St. Louis Railroad Company, Northern Pacific Railway Company, Oregon Short Line Railroad Company, Oregon-Washington Railroad and Navigation Company, Pennsylvania Company, The Pittsburgh and Lake Erie Railroad Company, The Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company, and Union Pacific Railroad Company, Defendants.

*Subpoena ad Respondendum.*

The President of the United States of America to Bessemer and Lake Erie Railroad Company, Greeting:

You, and each of you, are hereby commanded that you be and appear in said District Court of the United States, for the District of Oregon, at the Court room thereof, in the City of Portland, in said District, to answer the exigency of a Bill of Complaint exhibited and filed against you in our said Court, wherein Skinner and Eddy Corporation is complainant, and you are defendant, and further to do and receive what our said District Court shall consider in this behalf, and this you are in no wise to omit under the pains and penalties of what may befall thereon.

And this is to command you, the Marshal of said District, or of any other District in the United States, or your Deputy, to make due service of this our Writ of Subpoena and to make due return of the same with your proceedings thereon into this Court within twenty days from this date.

Hereof fail not.



Witness the Honorable Charles E. Wolverton and the Honorable Robert S. Bean, Judges of said Court, and the Seal thereof affixed at Portland, in said District, this 23rd day of August, 1916.

[SEAL.]

G. H. MARSH, *Clerk*,  
By F. L. BUCK,  
*Deputy Clerk*.

MEMORANDUM.—Pursuant to Equity Rule No. 12 of the Supreme Court of the United States:

The defendant is required to file his answer or other defense in the clerk's office on or before the twentieth day after service, excluding the day thereof; otherwise the bill may be taken pro confesso.

Returned and filed September 11, 1916.

G. H. MARSH, *Clerk*.

87 And afterwards, to wit, on the 23rd day of August, 1916, there was issued out of said Court a Subpœna ad Respondendum to the Pennsylvania Company, in words and figures, as follows, to wit:

88 *Return on Service of Writ.*

UNITED STATES OF AMERICA,  
*District of Oregon, ss:*

I hereby certify and return that I served the annexed Subpœna ad Respondendum on the therein-named Pennsylvania Co. by handing to and leaving a true and correct copy thereof with John S. Campbell, as District Freight and Passenger Agent, for the above named Company personally at Portland in said District on the 23rd day of August, A. D. 1916.

JOHN MONTAG,  
*U. S. Marshal*,  
By G. E. JACKSON, *Deputy*.

Served a copy of the within subpoena together with typewritten copy of rule to show cause in said case dated August 21, 1916, certified to by the attorney for the petitioner and printed copy of the petition, upon the within named defendant by the delivery of said copies to F. D. McKenney, at his office address, the said party being the Agent designated by said defendant to the Interstate Commerce Commission as the person upon whom service of process shall be made under the provisions of Section 6 of the Act of Congress, June 18th, 1910, entitled An Act to Create a Commerce Court, etc., this 29th day of August 1916.

MAURICE SPLAIN,  
*U. S. Marshal District of Columbia*.  
R.

89 In the District Court of the United States for the District of Oregon.

No. 7229.

SKINNER AND EDDY CORPORATION, Petitioner,

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, The Baltimore and Ohio Railroad Company, Bessemer and Lake Erie Railroad Company, Chicago, Burlington and Quincy Railroad Company, Chicago and North-Western Railway Company, Chicago, Milwaukee and St. Paul Railway Company, The Great Northern Railway Company, Illinois Central Railroad Company, The New York Central Railroad Company, The New York, Chicago and St. Louis Railroad Company, Northern Pacific Railway Company, Oregon Short Line Railroad Company, Oregon-Washington Railroad and Navigation Company, Pennsylvania Company, The Pittsburgh and Lake Erie Railroad Company, The Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company, and Union Pacific Railroad Company, Defendants.

*Subpoena ad Respondendum.*

The President of the United States of America to Pennsylvania Company, Greeting:

You, and each of you, are hereby commanded that you be and appear in said District Court of the United States, for the District of Oregon, at the Court room thereof, in the City of Portland, in said District, to answer the exigency of a Bill of Complaint exhibited and filed against you in our said Court, wherein Skinner and Eddy Corporation is complainant, and you are defendant, and further to do and receive what our said District Court shall consider in this behalf, and this you are in no wise to omit under the pains and penalties of what may befall thereon.

And this is to command you, the Marshal of said District, or of any other District in the United States, or your Deputy, to make due service of this our Writ of Subpoena and to make due return of the same with your proceedings thereon into this Court within twenty days from this date.

Hereof fail not.

Witness the Honorable Charles E. Wolverton and the Honorable Robert S. Bean, Judges of said Court, and the Seal thereof affixed at Portland, in said District, this 23rd day of August, 1916.

[SEAL.]

G. H. MARSH, Clerk,

By F. L. BUCK,

Deputy Clerk.

MEMORANDUM.—Pursuant to Equity Rule No. 12 of the Supreme Court of the United States:

The defendant is required to file his answer or other defense in the clerk's office on or before the twentieth day after service, excluding the day thereof; otherwise the bill may be taken pro confesso.

Returned and filed September 11, 1916.

G. H. MARSH, *Clerk*.

90 And afterwards, towit, on the 23rd day of August, 1916, there was issued out of said Court a Subpoena ad Respondendum to the Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company in words and figures, as follows, to wit:

91 Served a copy of the within subpoena together with type-written copy of rule to show cause in said case dated August 21, 1916, certified to by the attorney for the petitioner and printed copy of the petition, upon the within named defendant by the delivery of said copies to F. D. McKenney, at his office address, the said party being the Agent designated by said defendant to the Interstate Commerce Commission as the person upon whom service of process shall be made under the provisions of Section 6 of the Act of Congress, June 18th, 1910, entitled An Act to Create a Commerce Court, etc., this 29th day of August 1916.

MAURICE SPLAIN,

*U. S. Marshal, District of Columbia.*

R.

92 In the District Court of the United States for the District of Oregon.

No. 7229.

SKINNER AND EDDY CORPORATION, Petitioner,

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, The Baltimore and Ohio Railroad Company, Bessemer and Lake Erie Railroad Company, Chicago, Burlington and Quincy Railroad Company, Chicago and North-Western Railway Company, Chicago, Milwaukee and St. Paul Railway Company, The Great Northern Railway Company, Illinois Central Railroad Company, The New York Central Railroad Company, The New York, Chicago and St. Louis Railroad Company, Northern Pacific Railway Company, Oregon Short Line Railroad Company, Oregon-Washington Railroad and Navigation Company, Pennsylvania Company, The Pittsburgh and Lake Erie Railroad Company, The Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company, and Union Pacific Railroad Company, Defendants.

*Subpoena ad Respondendum.*

The President of the United States of America to Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company, Greeting:

You, and each of you, are hereby commanded that you be and appear in said District Court of the United States, for the District of Oregon, at the Court room thereof, in the City of Portland, in said District, to answer the exigency of a Bill of Complaint exhibited and filed against you in our said Court, wherein Skinner and Eddy Corporation is complainant, and you are defendant, and further to do and receive what our said District Court shall consider in this behalf, and this you are in no wise to omit under the pains and penalties of what may befall thereon.

And this is to command you, the Marshal of said District, or of any other District in the United States, or your Deputy, to make due service of this our Writ of Subpoena and to make due return of the same with your proceedings thereon into this Court within twenty days from this date.

Hereof fail not.

Witness the Honorable Charles E. Wolverton and the Honorable Robert S. Bean, Judges of said Court, and the Seal thereof affixed at Portland, in said District, this 23rd day of August, 1916.

[SEAL.]

G. H. MARSH, *Clerk*,

By F. L. BUCK, *Deputy Clerk*.

MEMORANDUM.—Pursuant to Equity Rule No. 12 of the Supreme Court of the United States:

The defendant is required to file *his* answer or other defense in the clerk's office on or before the twentieth day after service, excluding the day thereof; otherwise the bill may be taken pro confesso.

Returned and filed September 11, 1916. G. H. Marsh, Clerk.

93 . . . And afterwards, to wit, on Thursday, the 31st day of August, 1916, the same being the 51st Judicial day of the Regular July, 1916, Term of said Court; present the Honorable Charles E. Wolverton, United States District Judge, presiding, the following proceedings were had in said cause, to-wit:

94

*Order.*

In the District Court of the United States for the District of Oregon.

In Equity.

No. 7229.

SKINNER AND EDDY CORPORATION, Petitioner,

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, The Baltimore and Ohio Railroad Company, and Others, Defendants.

This cause came on to be heard on the application of the petitioner for a temporary restraining order, the petitioner appearing by Joseph N. Teal and William C. McCulloch, its solicitors, the United States of America by Blackburn Esterline, special assistant attorney general and John G. Beckman, deputy district attorney, the Interstate Commerce Commission by Charles W. Needham, special counsel, Great Northern Railway Company and Northern Pacific Railway Company by James B. Kerr, their solicitor, Oregon-Washington Railroad and Navigation Company, Oregon Short Line Railroad Company and Union Pacific Railroad Company by Arthur C. Spencer, their solicitor. The petitioner asked leave to withdraw its application for a restraining order, the defendants not objecting and good cause appearing therefor, it is

Ordered, adjudged and decreed that petitioner have leave to withdraw its application for a temporary restraining order without prejudice.

Dated at Portland, Oregon, August 31, 1916.

CHAS. E. WOLVERTON,

*District Judge.*

Filed August 31, 1916. G. H. Marsh, Clerk.

95

And afterwards, to wit, on the 8th day of September, 1916, there was duly filed in said Court, a Motion of The New York Central Railroad Company and The Pittsburgh and Lake Erie Railroad Company to dismiss the Bill of Complaint, in words and figures as follows, to wit:

96 In the District Court of the United States for the District of Oregon.

In Equity.

No. 7229.

SKINNER AND EDDY CORPORATION, Petitioner,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, The Baltimore and Ohio Railroad Company, Bessemer and Lake Erie Railroad Company, Chicago, Burlington and Quincy Railroad Company, Chicago and Northwestern Railway Company, Chicago, Milwaukee and St. Paul Railway Company, The Great Northern Railway Company, Illinois Central Railroad Company, The New York Central Railroad Company, The New York, Chicago and St. Louis Railroad Company, Northern Pacific Railway Company, Oregon Short Line Railroad Company, Oregon-Washington Railroad and Navigation Company, Pennsylvania Company, The Pittsburgh and Lake Erie Railroad Company, The Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company, and Union Pacific Railroad Company, Defendants.

Come now the defendants The New York Central Railroad Company and The Pittsburgh and Lake Erie Railroad Company and move the court to dismiss the bill of complaint herein upon the ground that it appears upon the fact of said bill that insufficient facts are therein stated to constitute a valid cause of action in equity.

CHARLES H. CAREY,

JAMES B. KERR,

*Solicitors for Defendants The New York Central Railroad Company and The Pittsburgh and Lake Erie Railroad Company.*

Filed September 8, 1916. G. H. Marsh, Clerk.

97 And afterwards, to wit, on the 8th day of September, 1917, there was duly filed in said Court, a Motion of The Great Northern Railway Company and the Northern Pacific Railway Company to dismiss the Bill of Complaint, in words and figures as follows, to wit:

98 In the District Court of the United States for the District of Oregon.

In Equity.

No. 7229.

SKINNER AND EDDY CORPORATION, Petitioner,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, The Baltimore and Ohio Railroad Company, Bessemer and Lake Erie Railroad Company, Chicago, Burlington and Quincy Railroad Company, Chicago and Northwestern Railway Company, Chicago, Milwaukee and St. Paul Railway Company, The Great Northern Railway Company, Illinois Central Railroad Company, The New York Central Railroad Company, The New York, Chicago and St. Louis Railroad Company, Northern Pacific Railway Company, Oregon Short Line Railroad Company, Oregon-Washington Railroad and Navigation Company, Pennsylvania Company, The Pittsburgh and Lake Erie Railroad Company, The Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company, and Union Pacific Railroad Company, Defendants.

Come now the defendants The Great Northern Railway Company and Northern Pacific Railway Company and move the Court to dismiss the bill of complaint herein upon the ground that it appears upon the face of said bill that insufficient facts are therein stated to constitute a valid cause of action in equity.

CHARLES H. CAREY,

JAMES B. KERR,

*Solicitors for Defendants The Great Northern  
Railway Company and Northern Pacific  
Railway Company.*

Filed September 8, 1916. G. H. Marsh, Clerk.

99 And afterwards, to wit, on the 12th day of October, 1916, there was duly filed in said Court, a Motion of The New York, Chicago and St. Louis Railroad Company to dismiss the Bill of Complaint, in words and figures as follows, to wit:

100 In the District Court of the United States for the District of Oregon.

In Equity.

No. 7229.

SKINNER AND EDDY CORPORATION, Petitioner,

VS.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, The Baltimore and Ohio Railroad Company, Bessemer and Lake Erie Railroad Company, Chicago, Burlington and Quincy Railroad Company, Chicago and Northwestern Railway Company, Chicago, Milwaukee and St. Paul Railway Company, The Great Northern Railway Company, Illinois Central Railroad Company, The New York Central Railroad Company, The New York, Chicago and St. Louis Railroad Company, Northern Pacific Railway Company, Oregon Short Line Railroad Company, Oregon-Washington Railroad and Navigation Company, Pennsylvania Company, The Pittsburgh and Lake Erie Railroad Company, The Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company, and Union Pacific Railroad Company, Defendants.

Comes now the defendant The New York, Chicago and St. Louis Railroad Company and moves the Court to dismiss the bill of complaint herein upon the ground that it appears upon the face of said bill that insufficient facts are therein stated to constitute a valid cause of action in equity.

CHARLES H. CAREY,  
JAMES B. KERR,

*Solicitors for Defendant The New York  
Chicago and St. Louis Railroad Company.*

Filed October 12, 1916. G. H. Marsh, Clerk.

101 And afterwards, to wit, on the 11th day of September, 1916, there was duly filed in said Court, a Motion of the Union Pacific Railroad Company, Oregon Short Line Railroad Company, and Oregon-Washington Railroad & Navigation Company, to dismiss the Bill of Complaint, in words and figures as follows, to wit:



102

*Motion.*

In the District Court of the United States for the District of Oregon.

In Equity.

SKINNER AND EDDY CORPORATION, Petitioner,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, The Baltimore and Ohio Railroad Company, Bessemer and Lake Erie Railroad Company, Chicago, Burlington and Quincy Railroad Company, Chicago and Northwestern Railway Company, Chicago, Milwaukee and St. Paul Railway Company, The Great Northern Railway Company, Illinois Central Railroad Company, The New York Central Railroad Company, The New York, Chicago and St. Louis Railroad Company, Northern Pacific Railway Company, Oregon Short Line Railroad Company, Oregon-Washington Railroad and Navigation Company, Pennsylvania Company, The Pittsburgh and Lake Erie Railroad Company, The Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company, and Union Pacific Railroad Company, Defendants.

The defendants, Union Pacific Railroad Company, Oregon Short Line Railroad Company and Oregon-Washington Railroad & Navigation Company, appearing by their solicitors herein, move the court to dismiss the bill of complaint and petition of the Petitioner herein, upon the ground and for the reason:

First. That it appears upon the face of said bill of complaint and petition that the same fails to state sufficient facts to constitute a valid cause of action in equity, and/or to entitle the Petitioner to the relief therein prayed for or for any relief.

103 Secondly. It appears upon the face of said bill or petition that the orders of the defendant Interstate Commerce Commission of June 5th and July 13th, 1916, and each and both of them were made upon the petition of the Merchants Association of Spokane, Washington, sometimes designated in said bill as the "Spokane Merchants' Association," and of the Nevada Railroad Commission, neither of which are residents of the District of Oregon, that the residence of the former is in the State of Washington in the Eastern District of Washington, and of the latter in the State and District of Nevada, and that this court is without jurisdiction to entertain said petition or to hear, try or determine the matters presented to this court by said Petitioner in its said petition or bill of complaint. That the proper venue for said action is either the Eastern District of the State of Washington or the District of Nevada.

H. A. SCANDRETT AND  
A. C. SPENCER,

*Solicitors for Union Pacific R. R. Company,  
Oregon Short Line R. R. Company, and Ore-  
gon-Washington R. R. & N. Company.*

Filed September 11, 1916. G. H. Marsh, Clerk.

104 And afterwards, to wit, on the 11th day of September, 1916, there was duly filed in said Court, a Motion of the Illinois Central Railroad Company, Chicago, Burlington and Quincy Railroad Company, and Chicago and Northwestern Railway Company, to dismiss the Bill of Complaint, in words and figures as follows, to wit:

105 *Motion.*

In the District Court of the United States for the District of Oregon.

In Equity.

SKINNER AND EDDY CORPORATION, Petitioner,

VS.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, The Baltimore and Ohio Railroad Company, Bessemer and Lake Erie Railroad Company, Chicago, Burlington and Quincy Railroad Company, Chicago and Northwestern Railway Company, Chicago, Milwaukee and St. Paul Railway Company, The Great Northern Railway Company, Illinois Central Railroad Company, The New York Central Railroad Company, The New York, Chicago and St. Louis Railroad Company, Northern Pacific Railway Company, Oregon Short Line Railroad Company, Oregon-Washington Railroad and Navigation Company, Pennsylvania Company, The Pittsburgh and Lake Erie Railroad Company, The Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company, and Union Pacific Railroad Company, Defendants.

The defendants, Illinois Central Railroad Company, Chicago, Burlington and Quincy Railroad Company, and Chicago and Northwestern Railway Company, appearing by their solicitors herein, move the court to dismiss the bill of complaint and petition of the Petitioner herein, upon the ground and for the reason:

First. That it appears upon the face of said bill of complaint and petition that the same fails to state sufficient facts to constitute a valid cause of action in equity, and/or to entitle the Petitioner to the relief therein prayed for or for any relief.

106 Secondly. It appears upon the face of said bill or petition that the orders of the defendant Interstate Commerce Commission of June 5th and July 13th, 1916, and each and both of them, were made upon the petition of the Merchants Association of Spokane, Washington, sometimes designated in said bill as the "Spokane Merchants' Association," and of the Nevada Railroad Commission, neither of which are residents of the District of Oregon, that the residence of the former is in the State of Washington in the Eastern District of Washington, and of the latter in the State and District of Nevada, and that this court is without jurisdiction to entertain said petition or to hear, try or determine the matters presented to this court by said Petitioner in its said petition or bill of complaint.

That the proper venue for said action is either the Eastern District of the State of Washington or the District of Nevada.

A. C. SPENCER AND

H. A. SCANDRETT,

*Solicitors for Illinois Central R. R. Company,  
Chicago, Burlington and Quincy Railroad  
Company and Chicago and Northwestern  
Railway Company.*

Service by copy admitted at Portland, Oregon, Sept. 11th, 1916.

WILLIAM C. McCULLOCH,

*One of Solicitors for Plaintiff.*

Filed September 11, 1916. G. H. Marsh, Clerk.

107 And afterwards, to wit, on the 13th day of September, 1917, there was duly filed in said Court, a Motion of Chicago, Milwaukee & St. Paul Railway Company to dismiss the Bill of Complaint, in words and figures as follows, to wit:

108

*Motion.*

In the District Court of the United States for the District of Oregon.

In Equity.

SKINNER AND EDDY CORPORATION, Petitioner,

VS.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, The Baltimore and Ohio Railroad Company, Bessemer and Lake Erie Railroad Company, Chicago, Burlington and Quincy Railroad Company, Chicago and Northwestern Railway Company, Chicago, Milwaukee and St. Paul Railway Company, The Great Northern Railway Company, Illinois Central Railroad Company, The New York Central Railroad Company, The New York, Chicago and St. Louis Railroad Company, Northern Pacific Railway Company, Oregon Short Line Railroad Company, Oregon-Washington Railroad & Navigation Company, Pennsylvania Company, The Pittsburgh and Lake Erie Railroad Company, The Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company, and Union Pacific Railroad Company, Defendants.

The defendant, Chicago, Milwaukee & St. Paul Railway Company, appearing by its solicitor herein, moves the court to dismiss the bill of complaint and petition of the Petitioner herein, upon the ground and for the reason:

First. That it appears upon the face of said bill of complaint and petition that the same fails to state sufficient facts to constitute a valid cause of action in equity, or to entitle the Petitioner to the relief therein prayed for or for any relief.

109 Secondly. It appears upon the face of said bill or petition that the orders of the defendant Interstate Commerce Commission of June 5th, and July 13th, 1916, and each and both of them were made upon the petition of the Merchants Association of Spokane, Washington, sometimes designated in said bill as the "Spokane Merchants' Association," and of the Nevada Railroad Commission, neither of which are residents of the District of Oregon, that the residence of the former is in the State of Washington in the Eastern District of Washington, and of the latter in the State and District of Nevada, and that this court is without jurisdiction to entertain said petition or to hear, try or determine the matters presented to this court by said Petitioner in its said petition or bill of complaint. That the proper venue for said action is either the Eastern District of the State of Washington or the District of Nevada.

F. M. DUDLEY,  
*Solicitor for Chicago, Milwaukee & St. Paul  
 Railway Company, 608 White Building, Se-  
 attle, Wash.*

110 STATE OF WASHINGTON,  
*County of King, ss:*

L. E. Neumen, being first duly sworn on oath deposes and says: that he is a clerk in the Legal Department of the Chicago, Milwaukee & St. Paul Railway Company; that he, to wit: on this 12th day of September, A. D. 1916, served the foregoing Motion upon the said petitioner, by depositing in the United States Post Office, at Seattle, Washington, a true and correct copy of said Motion, sealed in an envelope, with the postage thereon duly prepaid, addressed to Joseph N. Teal and William C. McCulloch, Spaulding Building, Portland, Oregon; that the said Joseph N. Teal and William C. McCulloch are the attorneys of record for the said petitioner and that Portland, Oregon, is their residence and post office address.

L. E. NEUMEN.

Subscribed and sworn to before me this 12th day of September, 1916.

[SEAL.]

F. M. BARKWILL,  
*Notary Public in and for said County and  
 State Residing at Seattle Therein.*

Filed September 13, 1916. G. H. Marsh, Clerk.

111 And afterwards, to wit, on the 25th day of September, 1916, there was duly filed in said Court, a Motion of the Interstate Commerce Commission to dismiss the Bill of Complaint, and Answer of the Interstate Commerce Commission, in words and figures as follows, to wit:

112     *Motion to Dismiss the Petition and Answer by the Interstate Commerce Commission.*

In the District Court of the United States for the District of Oregon.

In Equity.

No. 7229.

SKINNER AND EDDY CORPORATION, Petitioner,

VS.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, The Baltimore and Ohio Railroad Company, Bessemer and Lake Erie Railroad Company, Chicago, Burlington and Quincy Railroad Company, Chicago and Northwestern Railway Company, Chicago, Milwaukee and St. Paul Railway Company, The Great Northern Railway Company, Illinois Central Railroad Company, The New York Central Railroad Company, The New York, Chicago and St. Louis Railroad Company, Northern Pacific Railway Company, Oregon Short Line Railroad Company, Oregon-Washington Railroad & Navigation Company, Pennsylvania Company, The Pittsburgh and Lake Erie Railroad Company, The Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company, and Union Pacific Railroad Company, Defendants.

I.

The Interstate Commerce Commission, one of the respondents in the above-entitled cause, now comes and moves the Court to dismiss the petition filed herein for the following reasons:

1. The petitioners have no interest affected by the order in controversy which entitles them, or either of them, to maintain this suit.

2. The petition does not present a justiciable issue triable by this Court.

3. The petitioners and each of them were parties to, and had a full hearing before this respondent upon all the questions presented in the said petition in, the proceeding in which the order in controversy was entered, and the decision of this respondent upon the matters complained of is final and obligatory upon all the parties to said proceedings before this respondent.

4. The petition does not charge that the said proceedings before this respondent in which said order was entered were irregular or in any respect whatsoever were not in accordance with the procedure provided for in the Act to regulate commerce.

5. The petition does not allege facts which tend to show that this respondent, in entering the order in controversy, acted arbitrarily or without substantial evidence to support the order.

6. The petition does not disclose any facts which show or tend to show that the order in question violates any constitutional rights of the petitioners.

## II.

Without waiving its motion to dismiss the petition, and for answer to said petition, this respondent says:

1. For answer to said petition, and to each and every paragraph thereof, this respondent refers to its report and order, decided June 5, 1916, as amended July 13, 1916, attached to said petition, and copies of which it begs leave to submit to the Court upon the hearing hereof, and makes said report a part of its answer to said petition.

2. This respondent shows to the Court that since the filing of said petition, to wit, on the 29th day of September, 1916,  
114 this respondent, by virtue of power conferred upon it by the Act to regulate commerce, suspended the tariffs referred to and complained of in said petition, and said tariffs did not go into effect and will not go into effect pending the hearing and decision of this respondent regarding the reasonableness and propriety of the increases in rates made in said tariffs. A certified copy of said order suspending said tariffs is hereto attached, marked Exhibit A, and made a part of this answer.

Wherefore this respondent denies that the petitioners are entitled to the relief or any part thereof prayed for in said petition.

This respondent prays that its motion to dismiss said petition be granted, and that it may have its reasonable costs and charges in its behalf sustained.

INTERSTATE COMMERCE COMMISSION,  
By JOS. W. FOLK,  
CHAS. W. NEEDHAM,  
*Its Counsel.*

115

### EXHIBIT A.

Interstate Commerce Commission,  
Washington.

I, George B. McGinty, Secretary of the Interstate Commerce Commission, do hereby certify that the paper hereto attached is a true copy of the order of the Commission entered August 29, 1916, in Investigation and Suspension docket No. 909, the Trans-Continental Case, the original of which is now on file and of record in the office of this Commission.

In witness whereof I have hereunto set my hand and affixed the Seal of said Commission this 18th day of September, A. D. 1916.

[SEAL.]

GEORGE B. MCGINTY,  
*Secretary of the Interstate Commerce Commission.*

- 116 At a General Session of the Interstate Commerce Commission, Held at Its Office, in Washington, D. C., on the 29th Day of August, A. D. 1916.

Investigation and Suspension Docket No. 909.

Trans-Continental Case.

It appearing, that there have been filed with the Interstate Commerce Commission by R. H. Countiss, C. C. McCain and Eugene Morris, as agents for certain carriers, tariffs containing schedules stating new individual and joint rates and charges, and new individual and joint regulations and practices affecting such rates and charges, to become effective on the 1st day of September, 1916, designated as follows:

R. H. Countiss, Agent: Supplement No. 59 to I. C. C. No. 956, Supplement No. 60 to I. C. C. No. 956, Supplement No. 16 to I. C. C. No. 962, Supplement No. 6 to I. C. C. No. 1013, Supplement No. 3 to I. C. C. No. 1015, Supplement No. 13 to I. C. C. No. 1018, Supplement No. 14 to I. C. C. No. 1018, Supplement No. 8 to I. C. C. No. 1019, Supplement No. 11 to I. C. C. No. 1020, Supplement No. 2 to I. C. C. No. 1023, Supplement No. 1 to I. C. C. No. 1026;

C. C. McCain, Agent: Supplement No. 8 to I. C. C. No. 19, Supplement No. 11 to I. C. C. No. 20;

Eugene Morris, Agent: Supplement No. 8 to I. C. C. No. 575, Supplement No. 11 to I. C. C. No. 576.

It is ordered, that the Commission upon complaint, without formal pleading, enter upon a hearing concerning the propriety of the increases and the lawfulness of the rates, charges, regulations and practices stated in the said schedules contained in said tariffs, viz:

R. H. Countiss, Agent: Supplement No. 16 to I. C. C. No. 962, on pages 5, 6, 7, and 8 thereof, in Items Nos. 85-B, 95-A, 110-C, 120-C, 121-D, 122-B, 145-C, 146-B, 147-B, 228-A, 230-B, 233-D, 235-E, 240-D, 245-A, 247-D, 265-C, and 267-D; Supplement No. 6 to I. C. C. No. 1013, on pages 3, 4 and 5 thereof, in Items Nos. 20-A, 32-A, 55-A, 65-A and 70-D; Supplement No. 3 to I. C. C. No. 1015, on pages 5, 6 and 7 thereof, in Items Nos. 5-A, 7-B, 40-B, 42-A, 45-A, 47-A, 140-B, 142-B, 145-A, 147-A, 150-A and 152-A; Supplement No. 13 to I. C. C. No. 1018, on pages 115 to 141, inclusive, thereof, in Items Nos. 116-D, 128-A, 130-A, 157-A, 158-A, 170-B, 172-A, 174-A, 176-A, 178-A, 250-B, 252-B, 254-B, 256-B, 365-A, 442-A, 618-A, 622-B, 624-B, 626-A, 628-A, 629-A, 674-A, 676-B, 678-B, 680-B, 690-C, 692-B, 694-D, 696-C, 697-B, 698-C, 702-C, 728-A, 732-B, 734-B, 740-B, 782-A, 784-B, 912-B, 913, 918-C, 932-B, 937-A, 939-1-A, 939-2-B, 939-3-A, 939-4-A, 940-A, 942-D, 944-D, 946-C, 948-B, 950-B, 952-B and 954-A; on page 143 thereof, in Item No. 959-A; and on pages 144 to 153, inclusive, thereof; Supplement No. 14 to I. C. C. No. 1018, on page 168 thereof, in Item No. 698-D; on pages 173 and 174 thereof, in Items No. 912-C and 913-A; on page 177 thereof, in Item No. 939-4-B;



and on pages 180, 181 and 182 thereof; Supplement No. 2 to I. C. C. No. 1023, on page 3 thereof, in Items Nos. 136-A, 138-A and 140-A; on page 4 thereof; on pages 5, 6 and 7 thereof, in Items Nos. 198-A, 200-A, 202-A, 204-A, 206-A, 284-A, 286-A, 306-A 117 and 308-A; on pages 11 and 12 thereof; on pages 13, 14 and 15 thereof, in Items Nos. 574-A, 576-A, 580-A, 582-A, 584-A, 586-A, 590-A, 596-A, 598-A and 602-A; Supplement No. 1 to I. C. C. No. 1026, on pages 3, 4 and 5 thereof, in Items Nos. 50-A, 55-A, 100-A, 105-A, 110-A, 475-A, 630-A and 635-A; and the rates, charges, regulations and practices stated in all schedules contained in the said tariffs, viz:

R. H. Countiss, Agent: Supplement No. 59 to I. C. C. No. 956, Supplement No. 60 to I. C. C. No. 956; Supplement No. 8 to I. C. C. No. 1019, Supplement No. 11 to I. C. C. No. 1020;

C. C. McCain, Agent: Supplement No. 8 to I. C. C. No. 19, Supplement No. 11 to I. C. C. No. 20; and

Eugene Morris, Agent: Supplement No. 8 to I. C. C. No. 575, Supplement No. 11 to I. C. C. No. 576.

It further appearing, that said schedules make certain increases in rates for the interstate transportation of various commodities; and the rights and interests of the public appearing to be injuriously affected thereby, and it being the opinion of the Commission that the effective date of the said schedules contained in said tariffs should be postponed pending said hearing and decision thereon;

It is further ordered, that the operation of the said schedules contained in said tariffs be suspended, and that the use of the rates, charges, regulations and practices therein stated be deferred upon interstate traffic until the 30th day of December, 1916, unless otherwise ordered by the Commission, and no change shall be made in such rates, charges, regulations and practices during the said period of suspension unless authorized by special permission of the Commission.

It is further ordered, that the rates and charges thereby sought to be changed shall not be increased and the regulations and practices thereby sought to be altered shall not be changed by any subsequent tariff or schedule, until this investigation and suspension proceeding has been disposed of or until the period of suspension and any extension thereof has expired, unless authorized by special permission of the Commission.

And it is further ordered, that a copy of this order be filed with said schedules in the office of the Interstate Commerce Commission, and that copies hereof be forthwith served upon the carriers parties to said schedules and upon R. H. Countiss, C. C. McCain, and Eugene Morris, Agents, and that said carriers parties to said schedules be, and they are hereby, made respondents to this proceeding, and that they be duly notified of the time and place of the hearing above ordered.

By the Commission:

[SEAL.]

GEORGE B. MCGINTY, *Secretary*.

Filed September 25, 1916. G. H. Marsh, Clerk.

118 And afterwards, to wit, on the 26th day of September, 1916, there was duly filed in said Court, an Answer of the United States of America to the Petition, in words and figures as follows, to wit:

119 *Answer of the United States.*

In the District Court of the United States for the District of Oregon.

In Equity.

No. 7229.

SKINNER AND EDDY CORPORATION, Petitioner,

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, The Baltimore and Ohio Railroad Company, Bessemer and Lake Erie Railroad Company, Chicago, Burlington and Quincy Railroad Company, Chicago and North-Western Railway Company, Chicago, Milwaukee and St. Paul Railway Company, The Great Northern Railway Company, Illinois Central Railroad Company, The New York Central Railroad Company, The New York, Chicago and St. Louis Railroad Company, Northern Pacific Railway Company, Oregon Short Line Railroad Company, Oregon-Washington Railroad and Navigation Company, Pennsylvania Company, The Pittsburgh and Lake Erie Railroad Company, The Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company, and Union Pacific Railroad Company, Defendants.

United States of America, respondent, by its counsel, now comes, and for answer to the whole of the petition, and each and every part thereof, it says:

1. On January 29, 1915, Interstate Commerce Commission filed its report and entered its order in "Fourth Section Applications Nos. 205, 342, 343, 345, 344, 349, 350, and 352, Commodity Rates to Pacific Coast Terminals and Intermediate Points," referred to in the petition. On the same day, in the same matter, it entered

120 Amended Fourth Section Order No. 124, referred to in the petition. Subsequently, April 30, 1915, in the same matter, Interstate Commerce Commission filed its Second Supplemental Report, and entered its Amended Fourth Section Order No. 124, both of which are referred to in the petition. The said reports and orders so entered were not contested by the carriers who filed Fourth Section Applications Nos. 205, etc., and who appeared at and conducted the hearings before the Commission.

2. On March 20, 1916, Spokane Merchants Association, a corporation duly organized and existing under and by virtue of the laws of the State of Washington, with its principal office and place of business in the City of Spokane, said State, filed with the Interstate Commerce Commission its written petition, praying that the Com-

mission issue a show cause order directed to the rail carriers, and each of them, directing them to appear before the Commission at as early a date as possible and show cause why the Amended Fourth Section Order of January 29, 1915, and the Amended Fourth Section Order of April 30, 1915, and each of them, should not be cancelled. A copy of said petition is attached hereto and made a part hereof as Exhibit 1.

3. On March 15, 1916, Railroad Commission of Nevada, a commission duly created under and by virtue of a special act of the legislature of the State of Nevada, with the residence of its members in said State, and with its principal office and place of business at Carson City, said State, filed with the Interstate Commerce Commission its written petition, praying that the said Amended Fourth Section Order of January 29, 1915, and Amended Fourth Section Order of April 30, 1915, be vacated, canceled, and set aside, and that the whole subject matter of Fourth Section Applications Nos. 205, etc., be reopened for further consideration. A copy of said petition is attached hereto and made a part hereof as Exhibit 2.

4. On April 1, 1916, on the petition of Spokane Merchants Association and Railroad Commission of Nevada, Interstate Commerce Commission, by its order of that date, reopened for further hearing portions of Fourth Section Applications Nos. 205, 342, 343, 344, 349, 350, and 352. A copy of said order reopening certain of said Fourth Section Applications is a part of paragraph XXIII of the petition.

5. On June 5, 1916, and July 13, 1916, respectively, Interstate Commerce Commission entered the orders sought to be annulled and enjoined in so far as they authorize increased rates on iron and steel articles on and after September 1, 1916, and the increasing by the defendant carriers of rates on iron and steel articles in car loads from Pittsburgh to Pacific Coast ports. Said orders are referred to in the petition, and were entered in pursuance of the report filed June 5, 1916. Copies of the orders and the report are made a part of the petition. In the opening paragraph of the report of June 5, 1916 the Commission found:

This proceeding is the result of two petitions, one filed on behalf of the Spokane Merchants Association and the other by the Nevada Railroad Commission, asking the Commission to reopen for further consideration Fourth Section Applications Nos. 205, 342, 343, 344, 349, 350, and 352, filed on behalf of the trans-continental carriers, asking for fourth section relief as to commodity rates from eastern defined territory to Pacific coast points.

6. By an act entitled "An Act making Appropriations to Supply Urgent Deficiencies," approved October 22, 1913, 38 Stat. 219, 220, it is provided that:

The venue of any suit hereafter brought to enforce, suspend, or set aside, in whole or in part, any order of the Interstate Commerce Commission shall be in the judicial district wherein is the residence of the party or any of the parties upon whose petition the order

was made, except that where the order does not relate to transportation or is not made upon the petition of any party the venue shall be in the district where the matter complained of in the petition before the commission arises, and except that where the order does not relate either to transportation or to a matter so complained of before the commission the matter covered by the order shall be deemed to arise in the district where one of the petitioners in court has either its principal office or its principal operating office.

Neither Spokane Merchants Association nor Railroad Commission of Nevada, on whose petitions the orders sought to be annulled and enjoined were entered, has its residence within the judicial district for the District of Oregon. The residence of Spokane Merchants Association is within the judicial district for the Eastern District of Washington; the residence of Railroad Commission of Nevada is within the judicial district for the District of Nevada. Neither of said orders sought to be annulled and enjoined was entered on the petition of Skinner and Eddy Corporation, petitioner herein, but it was opposed to the said petitions, and it is now opposed to the orders entered thereon.

123 Wherefore, respondent prays that the petition for injunction be dismissed for want of jurisdiction, at the cost of the petitioner.

BLACKBURN ESTERLINE,  
*Special Assistant to the Attorney General.*

CLARENCE L. REAMES,  
*United States Attorney.*

JOHN J. BECKMAN,  
*Assistant United States Attorney.*

124

## EXHIBIT 1.

Before the Interstate Commerce Commission.

In the Matter of Fourth Section Orders Nos. 124, 205, 342, 343, 344, 349, 350, and 352, the same being applications for relief by certain carriers from the provisions of the Fourth Section of the Act Regulating Commerce, as amended June 18, 1910, with respect to rates from Eastern Territories to the Pacific Coast Terminals and intermediate points, and all other orders made under the Fourth Section which may not be above named but which affect the said rates from Atlantic defined points to Pacific defined points.

Comes now your Petitioner, Spokane Merchants Association, and alleges:

1. That it is a corporation duly organized and existing under and by virtue of the laws of the State of Washington, and its stockholders and members are composed almost exclusively of those engaged in wholesale and retail trade manufacturing and are heavy shippers of commodities, particularly from eastern defined ter-

ritories to the City of Spokane and surrounding territory known as the "Inland Empire."

2. That your petitioner, either in its own name or in the name of the City of Spokane, or the Spokane Chamber of Commerce was party to or intervenor in, the original applications in the above entitled matters upon which the foregoing mentioned orders were made.

3. That all of said orders were made for the purpose of  
125 granting to certain carriers, parties thereto, relief from the provisions of the Fourth Section of the Act to Regulate Commerce, as amended June 18, 1910. That when said orders and each of them were made the same were based upon applications of the carriers and upon proof submitted by said carriers of water competition as it existed at the time said applications were filed and hearings held.

4. That said Fourth Section of the Act to Regulate Commerce, as amended June 8, 1910, gives to your Honorable Commission the power and authority to, from time to time, fix the relief that shall be granted, and to measure the extent thereof. That the trans-continental railroads, and particularly, the Northern Pacific Railway, The Great Northern Railway, Chicago Milwaukee & St. Paul Railway, the Union Pacific Railroad and its connection, the Oregon-Washington Railroad & Navigation Company, the Atchison, Topeka & Santa Fe Railway, the Southern Pacific Railroad, and other trans-continental lines and their connections, have maintained for a number of years lower rates to the Pacific Seaboard cities from eastern defined territory than to Spokane and other points, and thereby have created a discrimination against the interior in favor of the said Pacific Coast cities. That by the orders hereinbefore mentioned, the said Commission authorized said discrimination upon the facts as presented and the conditions as existed at the time said orders were  
made.

126 5. That since said orders, and each of them, were made by your Honorable Commission, conditions and circumstances have materially changed; that the Panama Canal is now, and for several months last past has been closed by land slides, so that no shipping of any kind is being done through said canal, and your petitioner is informed and believes that said canal can not be opened for use of vessels for a period of from one to two years, or, if opened before said time, that the passage through said Panama Canal will be uncertain and unreliable and can not be depended upon by vessels engaged in the transportation of merchandise from coast to coast. That since said orders were made, shipping conditions have materially changed in that there is now a great deal more tonnage being offered for shipment than can be handled by the said railroads and steamship companies, and the said steamship companies and steamships formerly engaged in the traffic from coast to coast because of the European war have engaged in other trade, and even if the said canal was opened at once, because of said boats being engaged in foreign trade, it would not be possible for them to engage in the transportation of merchandise from coast to coast for a period, as

your petitioner is informed and verily believes, of from one to two years after the close of the European war. That the particular boat lines engaged in the coastwise traffic have rented and chartered their vessels for other trade, ranging from a period of six to ten months, and the organizations of said shipping companies for such transportation are disorganized, and on account thereof, as hereinbefore set forth, there is now no water competition existing in particular from the eastern seaboard to the western seaboard. That there no longer exists any reason why the said railroads should be relieved from the so-called Fourth Section, and as your petitioner is  
127 informed and believes, there will be no competition for a long period of time which would justify the relieving of said carriers from the Fourth Section and the long and short haul clause thereof.

6. That on account of the changed conditions and there being no water competition, the rates now maintained to the interior intermountain cities and particularly to Spokane, as against the rates maintained to the coast cities, and particularly Portland, Tacoma, Seattle, and other Northwest Pacific Coast points are unduly discriminatory.

Wherefore your petitioner prays that your Honorable Commission issue a show cause order directed to said rail carriers, and each of them, directing them to appear before your Honorable Body at as early a date as possible and show cause, if any there be, why the said orders, and each and every one of them, should not be cancelled.

And for such further and other relief as to your Honorable Body may seem just and reasonable.

SPOKANE MERCHANTS ASSOCIATION,

*Petitioner.*

By J. B. CAMPBELL, *Its Attorney.*

Dated March 17, 1916.

128

Interstate Commerce Commission,

Washington.

I, George B. McGinty, Secretary of the Interstate Commerce Commission, do hereby certify that the attached is true copy of petition filed March 20, 1916, by the Spokane Merchants Association in re Fourth Section Applications Nos. 205, 342, 343, 344, 349, 350, and 352, the original of which is now on file and of record in the office of this Commission.

In witness whereof I have hereunto set my hand and affixed the Seal of said Commission this 20th day of September, A. D., 1916.

(Signed)

GEORGE B. MCGINTY,

[SEAL.] *Secretary of the Interstate Commerce Commission.*

129

## EXHIBIT 2.

Before the Interstate Commerce Commission.

In the Matter of Orders Made by the Commission on January 29, 1915, and April 30, 1915, Relating to Applications Nos. 205, 342, 343, 344, 349, 350, and 352, the Same Being Application for Relief by Certain Carriers from the Provisions of the Fourth Section of the Act Regulating Commerce, as Amended June 18, 1910, with Respect to Commodity Rates from Eastern Territories to the Pacific Coast Terminals, and Intermediate Points.

*Petition by the Railroad Commission of Nevada.*

To the Honorable the Interstate Commerce Commission:

Your petitioner very respectfully petitions and asks that the two orders referred to above be vacated, canceled, and set aside, and that the whole subject-matter of the applications referred to be reopened for further consideration, or, if such course be deemed inadvisable by the Commission, that Order No. 124, previously made, be reinstated, and the rates therein prescribed be ordered into effect.

In this behalf your petitioner directs your attention to the fact that the order of January 29, 1915, was based almost, if not  
130 entirely, upon a showing by the railroad carriers to the effect that during the month of September, 1914, there had been a largely increased quantity of freight carried through the Panama Canal, it being alleged and shown by statistical data that for the said month the freight movement through the waterway amounted to 77,915 tons, which, if taken as a fair average, equals 934,980 tons for the year; and, further, that there had been a few movements of commodities by water since the opening of the Canal which previously had moved exclusively by rail.

It was strongly contended at the time of the hearing at Chicago, in October, 1914, by those opposing the carriers' petition for further relief, under the long-and-short-haul clause in the Interstate Commerce Act as amended, that this showing was wholly insufficient to justify your honorable Commission in granting the whole or any portion of the relief prayed for.

It is now respectfully submitted that subsequent events have fully justified the attitude of the representatives of the intermountain country in thus opposing the petition of the carriers.

Upon information and belief your petitioner alleges that the tonnage for the said month of September, 1914, through the Panama Canal has never been equaled, or anywhere near equaled, during any subsequent month; that slide after slide has occurred in the canal, stopping navigation for considerable periods of time; that recently another slide of immense proportions has taken place, and at the present time the indications are that it will be many months before



anything like regular traffic can be resumed through the canal.

131 Your petitioner further alleges, upon information and belief, that at the present time the freight tonnage carried by water is no greater than it was before the opening of the Panama Canal, and that meanwhile the tonnage by rail has largely increased; wherefore, your petitioner alleges that the only reasons given for the making of the two orders referred to herein have failed, and have been proven to be unsound by the logic of events.

The uncertainties pertaining to the freight traffic through the Panama Canal were pointed out by this Commission on page 65 of its brief in language which, considering what has occurred since, may almost be characterized as prophetic. Nothing could be clearer to the mind of any intelligent person familiar with Panama conditions than that for years to come the traffic through the Canal will not assume the regular magnitude necessary to make such traffic a factor seriously to be considered in the determination of the question involved, because it should be kept ever in mind that, even though there be a large increase of tonnage through the Canal, the business of the country, as a whole, is increasing by leaps and bounds, and it is impossible for commerce between the two seaboard by water to ever assume a character which should be considered as controlling in determining what are just and reasonable rates into the intermountain country, where, with respect to the traffic which actually moves, it is ultraconservative to say that the average length of haul is not more than one-half the total distance from ocean to ocean.

Your petitioner deems it proper once more to direct the attention of the Commission to the fact that, in these intermountain cases, the final carriers are the only ones who were in any way affected  
132 by Order No. 124; that all the testimony including said order was furnished by the final carriers, and that the same was true at the Chicago hearing upon the basis of which the said order was modified.

Upon this point your petitioner desires further to direct the attention of the Commission to the showing made by the Nevada Commission to the effect that the rates, as prescribed by said Order No. 124, would yield to the Southern Pacific Company a splendid return for the service rendered, and herein your petitioner feels it only just to suggest that the statement contained in the report of January 29, 1915, concerning the showing made by the Nevada Commission with reference to the divisions accruing to the Southern Pacific Company, as appears on page 625, vol. 32, I. C. C. Reports, does not accurately state the principle that is involved, or the purpose which the Nevada Railroad Commission had in view in making such showing.

At the time of said hearing, and later by both oral and written arguments, counsel for the Nevada Commission, speaking for that Commission and for others interested, expressly disclaimed any purpose to dispute or question the propriety of the divisions made by the carriers themselves.

Referring to this matter, on page 47 of the brief for the Rail-

road Commission of Nevada and Public Utilities Commission of Idaho will be found this language:

We do this, not for the purpose of objecting to those divisions. That is a question to be determined by the carriers themselves. But it has a very important bearing on the question of how the petitioning carriers are going to be affected by permitting Order No. 124 to stand as it is. It being clear that the final carriers are the only ones profiting by the excess charges complained of and that they are the only ones who will be affected by further reductions under the operation of Order No. 124, it is quite material to show what the divisions of the final carriers are of the through rate, and then consider that in connection with the back-haul charge and differentials allowed which inure solely to the benefit of these final carriers.

133 The testimony of the railroad witnesses themselves has made it absolutely clear that the excess charges complained of by the different States in the intermountain territory are not, and never have been, made the subject of any division whatever among the various carriers taking part in the transportation of freight into that region. It has been made as clear as testimony can make anything that these excess charges, popularly termed "back-haul charges," have been arbitrarily levied by the final carriers, and that they stand upon their tariffs entirely separate and apart from the matter of transcontinental rates. In other words, that the rates charged at Reno are not, in any proper sense, transcontinental charges, but transcontinental charges plus something more imposed by the final carriers.

In closing this petition, which may be a final appeal to your honorable body upon a subject which petitioner feels is of momentous import to the entire intermountain region, it is considered fitting to add that, in the judgment of petitioner and those representing all parts of the intermountain country, Order No. 124 gave to the railroad carriers very much more relief from the long-and-short-haul clause than their evidence entitled them to. This feeling and belief has been greatly strengthened by what has transpired since, because it has been shown that the evidence considered by the Commission in making said order consisted very largely of conjectural estimates, looking into what was then the future, which estimates have utterly failed of verification. In view of their central geographical location, the people of the intermountain States have always been of the opinion that the plea of water competition at coast terminals in justification of the very much higher rates to the

134 interior was without substantial foundation, and was, in fact, the injecting of a false element into the question. That opinion is adhered to and will continue to be retained by the entire intermountain country until the railroad carriers present better, clearer, and stronger testimony than has yet been laid before the Interstate Commerce Commission.

In conclusion, petitioner once more asks that your honorable body will, in its wisdom and sense of fairness, either reinstate Order No. 124, or reopen the entire subject-matter for further hearing, and

make a new order thereon which will be still more in consonance with the principles of equality and justice, and give to the intermountain states, particularly Nevada, a still larger measure of relief. Upon this latter point we cannot refrain from emphasizing the contention which the Nevada Railroad Commission has consistently adhered to throughout the proceedings in these intermountain cases, that, in view of the central location of the intermountain States, the very much shorter haul and the demonstrated fact that the excess charges complained of all inure to the benefit of the final carriers, there should be no differentials whatever in favor of the coast terminals.

Very respectfully submitted,

RAILROAD COMMISSION OF NEVADA,  
By H. F. BARTINE,  
*Chief Commissioner and Counsel.*

135 Interstate Commerce Commission,  
Washington.

I, George B. McGinty, Secretary of the Interstate Commerce Commission, do hereby certify that the attached is true copy of petition filed March 15, 1916, by the Railroad Commission of Nevada in re Fourth Section Applications Nos. 205, 342, 343, 344, 349, 350, and 352, the original of which is now on file and of record in the office of this Commission.

In witness whereof I have hereunto set my hand and affixed the Seal of said Commission this 20th day of September, A. D., 1916.

(Signed)

GEORGE B. MCGINTY,

[SEAL.] *Secretary of the Interstate Commerce Commission.*

Filed September 26, 1916. G. H. Marsh, Clerk.

136 And afterwards, to wit, on Wednesday, the 13th day of December 1916, the same being the 32nd Judicial day of the Regular November, 1916, Term of said Court; present the Honorable Charles E. Wolverton, United States District Judge, presiding, the following proceedings were had in said cause, to-wit:

137 In the District Court of the United States for the District of Oregon.

No. 7229.

SKINNER & EDDY CORPORATION, Plaintiff,

v.

UNITED STATES OF AMERICA et al., Defendants.

December 13, 1916.

Now at this day, on motion of Mr. William C. McCulloch, of counsel for plaintiff in the above entitled cause,

It is ordered that he be and is hereby allowed to file a supplemental bill of complaint herein.

138 And afterwards, to wit, on the 16th day of December, 1916, there was duly filed in said Court, a Supplemental Petition, in words and figures as follows, to wit:

139 *Return on Service of Writ.*

UNITED STATES OF AMERICA,  
*District of Oregon, ss:*

I hereby certify and return that I served the Supplemental Petition on the therein-named Pennsylvania Company by handing to and leaving a true and correct and certified copy thereof with J. S. Campbell as District Freight and Passenger Agent for the Pennsylvania Company by Herbert Rowland his clerk in charge during the absence of J. S. Campbell as Agent for the above named Company personally at Portland in said District on the 18 day of December, A. D. 1916.

JOHN MONTAG,  
*U. S. Marshal,*  
By G. E. JACKSON, *Deputy.*

140 *Return on Service of Writ.*

UNITED STATES OF AMERICA,  
*District of Oregon, ss:*

I hereby certify and return that I served Supplemental Petition on the therein-named Pittsburg, Cincinnati, Chicago & St. Louis Railway Company by handing to and leaving a true and correct certified copy thereof with J. S. Campbell as District Freight & Passenger Agent for the Pittsburg, Cincinnati, Chicago & St. Louis Ry. Co. by Herbert Rowland his Clerk in charge during absence of said J. S. Campbell as such named agent for the above named Railway Co. personally at Portland in said District on the 18 day of December, A. D. 1916.

JOHN MONTAG,  
*U. S. Marshal,*  
By G. E. JACKSON, *Deputy.*

Filed December 19, 1916. G. H. Marsh, Clerk.

141

*Supplemental Petition.*

In the District Court of the United States for the District of Oregon.

In Equity.

No. 7229.

SKINNER AND EDDY CORPORATION, Petitioner,

VS.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, The Baltimore and Ohio Railroad Company, Bessemer and Lake Erie Railroad Company, Chicago, Burlington and Quincy Railroad Company, Chicago and Northwestern Railway Company, Chicago, Milwaukee and St. Paul Railway Company, The Great Northern Railway Company, Illinois Central Railroad Company, The New York Central Railroad Company, The New York, Chicago and St. Louis Railroad Company, Northern Pacific Railway Company, Oregon Short Line Railroad Company, Oregon-Washington Railroad & Navigation Company, Pennsylvania Company, The Pittsburgh and Lake Erie Railroad Company, The Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company, and Union Pacific Railroad Company, Defendants.

Joseph N. Teal, William C. McCulloch, Solicitors for Petitioner.  
Teal, Minor and Winfree, Portland, Oregon; L. B. Stedman, Seattle, Washington; W. E. Creed, San Francisco, California, of Counsel.

142 In the District Court of the United States for the District of Oregon.

In Equity.

No. 7229.

SKINNER AND EDDY CORPORATION, Petitioner,

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, The Baltimore and Ohio Railroad Company, Bessemer and Lake Erie Railroad Company, Chicago, Burlington and Quincy Railroad Company, Chicago and North-Western Railway Company, Chicago, Milwaukee and St. Paul Railway Company, The Great Northern Railway Company, Illinois Central Railroad Company, The New York Central Railroad Company, The New York, Chicago and St. Louis Railroad Company, Northern Pacific Railway Company, Oregon Short Line Railroad Company, Oregon-Washington Railroad and Navigation Company, Pennsylvania Company, The Pittsburgh and Lake Erie Railroad Company, The Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company, and Union Pacific Railroad Company, Defendants.

143

*Supplemental Petition.*

To the Honorable the Judges of the District Court of the United States for the District of Oregon, Sitting in Equity:

Your petitioner, Skinner and Eddy Corporation, by leave of court, brings this its Supplemental Petition against the United States of America, Interstate Commerce Commission, The Baltimore and Ohio Railroad Company, Bessemer and Lake Erie Railroad Company, Chicago, Burlington and Quincy Railroad Company, Chicago and North-Western Railway Company, Chicago, Milwaukee and St. Paul Railway Company, The Great Northern Railway Company, Illinois Central Railroad Company, The New York Central Railroad Company, The New York, Chicago and St. Louis Railroad Company, Northern Pacific Railroad Company, Oregon Short Line Railroad Company, Oregon-Washington Railroad and Navigation Company, Pennsylvania Company, The Pittsburgh and Lake Erie Railroad Company, The Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company, and Union Pacific Railroad Company, and thereupon complainant says:

I.

On August 21, 1916, your petitioner duly filed its original petition in this court against the defendants, in which your petitioner prayed for certain relief, the particulars of which are set forth in full in the

original petition, leave to refer to which is prayed hereby as if the same were set forth herein in full. All the above named defendants were duly served with subpoena and with certified copies of the petition and thereafter by their respective solicitors they all appeared except The Baltimore and Ohio Railroad Company, Bessemer and Lake Erie Railroad Company, Pennsylvania Company, and The Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company and put in answers in due course or motions to dismiss the petition.

The time to answer of The Baltimore and Ohio Railroad  
144 Company, Bessemer and Lake Erie Railroad Company,  
Pennsylvania Company, and The Pittsburgh, Cincinnati,  
Chicago and St. Louis Railway Company has expired long since.

## II.

After the petition was filed one of the judges of this court on August 21, 1916 signed an order requiring the defendants to appear before the court on August 31, 1916, to show cause why a restraining order and injunction should not issue against them as prayed in the petition. This order to show cause was filed in this court on August 23, 1916 and was duly served on each of the defendants.

## III.

Thereafter and on August 29, 1916 the Interstate Commerce Commission made an order and thereby suspended until December 30, 1916, unless otherwise ordered by the Commission, the operation of the tariff schedules in which were published the increased rates, mentioned in paragraph XXIV of the petition, for the transportation from Pittsburgh to Seattle of iron and steel articles in carloads of divers minimum weights, which order was in words and figures as follows, namely.

### *Order.*

At a General Session of the Interstate Commerce Commission, Held at Its Office, in Washington, D. C., on the 29th Day of August, A. D. 1916.

Investigation and Suspension Docket No. 909.

### Trans-Continental Case.

145 It appearing, That there have been filed with the Interstate Commerce Commission by R. H. Countiss, C. C. McCain and Eugene Morris, as agents for certain carriers, tariffs containing schedules stating new individual and joint rates and charges, and new individual and joint regulations and practices affecting such rates and charges, to become effective on the 1st day of September, 1916, designated as follows:

R. H. Countiss, Agent: Supplement No. 59 to I. C. C. No. 956,



Supplement No. 60 to I. C. C. No. 956, Supplement No. 16 to I. C. C. No. 962, Supplement No. 6 to I. C. C. No. 1013, Supplement No. 3 to I. C. C. No. 1015, Supplement No. 13 to I. C. C. No. 1018, Supplement No. 14 to I. C. C. No. 1018, Supplement No. 8 to I. C. C. No. 1019, Supplement No. 11 to I. C. C. No. 1020, Supplement No. 2 to I. C. C. No. 1023, Supplement No. 1 to I. C. C. No. 1026;

C. C. McCain, Agent: Supplement No. 8 to I. C. C. No. 19, Supplement No. 11 to I. C. C. No. 20;

Eugene Morris, Agent: Supplement No. 8 to I. C. C. No. 575, Supplement No. 11 to I. C. C. No. 576.

It is ordered, That the Commission upon complaint, without formal pleading, enter upon a hearing concerning the propriety of the increases and the lawfulness of the rates, charges, regulations and practices stated in the said schedules contained in said tariffs, viz:

R. H. Countiss, Agent: Supplement No. 16 to I. C. C. No. 962, on pages 5, 6, 7 and 8, thereof, in Items Nos. 85-B, 95-A, 110-C, 120-C, 121-D, 122-B, 145-C, 146-B, 147-B, 228-A, 230-B, 233-D, 235-E, 240-D, 245-A, 247-D, 265-C and 267-D; Supplement No. 6 to I. C. C. No. 1013 on page 3, 4 and 5 thereof, in Items Nos. 20-A, 32-A, 55-A, 65-A and 70-D; Supplement No. 3 to I. C. C. No. 1015, on pages 5, 6 and 7 thereof, in Items Nos. 5-A, 7-B, 40-B, 146 42-A, 45-A, 47-A, 140-B, 142-B, 145-A, 147-A, 150-A, and 152-A; Supplement No. 13 to I. C. C. No. 1018, on pages 115 to 141, inclusive, thereof, in Items Nos. 116-D, 128-A, 130-A, 157-A, 158-A, 170-B, 172-A, 174-A, 176-A, 178-A, 250-B, 252-B, 254-B, 256-B, 365-A, 442-A, 618-A, 622-B, 624-B, 626-A, 628-A, 629-A, 674-A, 676-B, 678-B, 680-B, 690-C, 692-B, 694-D, 696-C, 697-B, 698-C, 702-C, 728-A, 732-B, 734-B, 740-B, 782-A, 784-B, 912-B, 913, 918-C, 932-B, 937-A, 939-1-A, 939-2-B, 939-3-A, 939-4-A, 940-A, 942-D, 944-D, 946-C, 948-B, 950-B, 952-B and 954-A on page 143 thereof, in Item No. 959-A; and on pages 144 to 153, inclusive, thereof; Supplement No. 14 to I. C. C. No. 1018, on page 168 thereof, in Item No. 698-D; on pages 173 and 174 thereof, in Items No. 912-C and 913-A; on page 177 thereof, in Item 939-4-B; and on pages 180, 181 and 182 thereof; Supplement No. 2 to I. C. C. No. 1023, on page 3 thereof, in Items Nos. 136-A, 138-A and 140-A; on page 4 thereof; on pages 5, 6 and 7 thereof; in Items Nos. 198-A, 200-A, 202-A, 204-A, 206-A, 284-A, 286-A, 306-A and 308-A; on pages 11 and 12 thereof; on pages 13, 14 and 15 thereof, in Items Nos. 574-A, 576-A, 580-A, 582-A, 584-A, 586-A, 590-A, 596-A, 598-A, and 602-A; Supplement No. 1 to I. C. C. No. 1026, on pages 3, 4 and 5 thereof, in Items Nos. 50-A, 55-A, 100-A, 105-A, 110-A, 475-A, 630-A and 635-A; and the rates, charges, regulations and practices stated in all schedules contained in the said tariffs, viz:

R. H. Countiss, Agent: Supplement No. 59 to I. C. C. No. 956, Supplement No. 60 to I. C. C. No. 956; Supplement No. 8 to I. C. C. No. 1019, Supplement No. 11 to I. C. C. No. 1020;

C. C. McCain, Agent: Supplement No. 8 to I. C. C. No. 147 19; Supplement No. 11 to I. C. C. No. 20; and

Eugene Morris, Agent: Supplement No. 8 to I. C. C. No. 575; Supplement No. 11 to I. C. C. No. 576.

It further appearing, That said schedules make certain increases in rates for the interstate transportation of various commodities; and the rights and interests of the public appearing to be injuriously affected thereby, and it being the opinion of the Commission that the effective date of the said schedules contained in said tariffs should be postponed pending said hearing and decision thereon;

It is further ordered, That the operation of the said schedules contained in said tariffs be suspended, and that the use of the rates, charges, regulations and practices therein stated be deferred upon interstate traffic until the 30th day of December, 1916, unless otherwise ordered by the Commission, and no change shall be made in such rates, charges, regulations and practices during the said period of suspension unless authorized by special permission of the Commission.

It is further ordered, That the rates and charges thereby sought to be changed shall not be increased and the regulations and practices thereby sought to be altered shall not be changed by any subsequent tariff or schedule, until this investigation and suspension proceeding has been disposed of or until the period of suspension and any extension thereof has expired, unless authorized by special permission of the Commission.

And it is further ordered, That a copy of this order be filed with said schedules in the office of the Interstate Commerce Commission, and that copies hereof be forthwith served upon the carriers parties to said schedules and upon R. H. Countiss, C. C. McCain and Eugene Morris, Agents, and that said carriers parties to said schedules be, and they are hereby, made respondents to this proceeding, and that they be duly notified of the time and place of the hearing above ordered.

148 By the Commission:

[SEAL.]

GEORGE B. MCGINTY, *Secretary*.

By virtue of this last mentioned order the increased rates mentioned and described therein did not become effective on September 1, 1916, but the rates theretofore in effect and applicable to the transportation from Pittsburgh to Seattle of iron and steel articles in carloads of divers minimum weights remained, have been ever since, and are now the lawful rates on those commodities, and your petitioner accordingly on August 31, 1916, obtained leave of this court to withdraw without prejudice its application for a temporary restraining order.

#### IV.

Thereafter the Interstate Commerce Commission on September 19, 1916, made an order and attempted thereby further to amend as of date of August 31, 1916, its order of June 5, 1916, as amended July 13, 1916, (which original and amended orders are set forth verbatim on pages 39 to 44 inclusive of the petition), so as to become effective December 30, 1916, instead of September 1, 1916, which order was in words and figures as follows, namely:

## Interstate Commerce Commission.

*Order.*

At a General Session of the Interstate Commerce Commission, Held at Its Office, in Washington, D. C., on the 19th Day of September, A. D. 1916.

In the Matter of Reopening Fourth Section Applications 205, 342, 343, 344, 349, 350, 352, and 10336, filed by R. H. Countiss, Agent, on behalf of various transcontinental carriers for authority to continue lower rates on certain commodities from eastern defined territory to Pacific Coast points than the rates contemporaneously applicable on like traffic to Intermediate points, and In the Matter of Reopening Fourth Section Applications 9813, 1110, 10126, 10155, 10186, and 10189, filed by R. H. Countiss, Agent, on behalf of the Southern Pacific Company Atlantic Steamship Lines, The Atchison, Topeka & Santa Fe Railway Company, and Mallory Steamship Company respecting rates on barley, beans, canned goods, asphaltum, dried fruit, and wine from California ports to points on the Atlantic Seaboard which are lower than the rates contemporaneously applicable from intermediate points, 40 I. C. C., 35.

Upon further consideration of the order entered on June 5, 1916, as amended July 13, 1916, in the above-entitled matter rescinding, effective September 1, 1916, Fourth Section Order No. 124 of April 30, 1915, and Fourth Section Order No. 5409 of March 1, 1916, in so far as the rates on schedule C commodities named in Commodity Rates to Pacific Coast Terminals, 32 I. C. C., 611, are concerned, and Fourth Section Orders 4767, 5012, 5088, and 5099 respecting the rates on barley, beans, canned goods, asphaltum, dried fruits, and wines from California ports via rail-and-water routes to the Atlantic seaboard,

It appearing, That tariffs, filed by the petitioners under the above applications, containing schedules of rates superseding the rates established by authority of the above-mentioned orders, to become effective September 1, 1916, have been suspended by order of the Commission entered August 29, 1916, in re Investigation and Suspension Docket No. 909,

And it further appearing, That the effect of the said order of suspension is to continue in force the rates established by authority of the fourth section orders above enumerated until December 30, 1916, therefore,

It is ordered, that the order entered in the above-entitled matter on June 5, 1916, as amended July 13, 1916, be, and the same is hereby, further amended as of date of August 31, 1916, so as to become effective December 30, 1916, instead of September 1, 1916.

By the Commission:

[SEAL.]

GEORGE B. MCGINTY, *Secretary.*

After Supplement No. 11 to Tariff 4-M had been issued as alleged in paragraph XXIV of the petition and had been filed in the manner provided by law with the Interstate Commerce Commission, the said order of the latter of June 5, 1916, as amended July 13, 1916, became on September 1, 1916, *functus officio* and the Commission went beyond its lawful powers in attempting to give a retroactive application and effect to its aforesaid *nunc pro tunc* order of September 19, 1916, and said order was and is invalid, null and void and of no binding force and effect.

## V.

Thereafter on October 17, 1916, the Interstate Commerce Commission made an order and thereby reopened for further hearing certain fourth section applications, including No. 10336 respecting rates on iron and steel articles in carloads from Pittsburgh and other points to Seattle and other Pacific coast ports and consolidated therewith for hearing at the times and places therein designated Investigation and Suspension Docket No. 909, which order of October 17, 1916, was in words and figures as follows, namely:

151

### *Order.*

At a General Session of the Interstate Commerce Commission, Held at Its Office, in Washington, D. C., on the 17th Day of October, 1916.

Investigation and Suspension Docket No. 909.

### Transcontinental Case.

Fourth Section Applications Nos. 205, etc., Respecting Rates on Commodities from Eastern Defined Territory to Pacific Coast Ports and Intermediate Points.

Fourth Section Applications Nos. 9813, etc., Respecting Rates on Barley, Beans, Canned Goods, Asphaltum, Dried Fruit, Wine, and Other Commodities from Pacific Coast Ports to Eastern Destinations.

Whereas, the various carriers operating routes by rail and by rail and water between the Atlantic and the Pacific coasts of the United States and publishing rates on many commodities, which are lower for longer than for shorter hauls over the same line in the same direction, the shorter haul being included within the longer, in contravention of the fourth section of the act to regulate commerce, by fourth section applications Nos. 205, 342, 343, 344, 349, 350 and 352, filed by R. H. Countiss, Agent, on behalf of carriers, parties to his tariffs, named in said applications, sought authority to continue to charge and receive a greater compensation for the transportation of property for the shorter than for the longer haul;

152       Whereas, further, the Commission by its reports and orders of January 29, and April 30, 1915, *Commodity Rates to Pacific Coast Terminals*, 32 I. C. C. 611, 34 I. C. C. 13, authorized the carriers, parties to the above-named applications in some instances to continue to charge and receive a greater compensation for the transportation of property for the shorter hauls from eastern defined territories to intermountain territory than for the longer hauls to Pacific Coast terminals, subject, however, to certain rules and restrictions with regard to the rates to intermediate points, which rules and restrictions respecting rates on a group of commodities named in the reports and known as Schedule C commodities, which are particularly adapted to transportation by water, differ in certain respects from the rules and restrictions respecting rates on other commodities known as Schedule B commodities;

Whereas further, by petition filed March 17, 1916, by the Merchants' Association of Spokane, Wash., it was asserted that on account of slides in the Panama Canal and the increased demand for ships for conveyance of traffic between the United States and various European countries, the service by water between the Atlantic and Pacific coasts of the United States had in large part been discontinued and that the orders of January 29 and April 30, 1915, granting in part the relief sought by the carriers, were based upon the then-existing necessity for the maintenance of unusually low rates by rail from eastern defined territories to Pacific coast ports on account of the competition by water, which necessity, by reason of the abatement of the water competition, no longer existed, and that the Commission should reopen the fourth section applications above named, and after hearing, make such other and different order as the changed conditions might justify;

153       Whereas, further, the Commission by appropriate order reopened the fourth section applications respecting rates on commodities from eastern defined territories to Pacific coast ports and intermediate points, in so far as they concerned the rates on the Schedule C commodities, and reopened fourth section applications Nos. 9813, 10110, 10126, 10155, 10186, and 10189 respecting rates on barley, beans, canned goods, asphaltum, dried fruit and wine from California ports via rail and water through Galveston, Tex., to points on the east coast of the United States;

Whereas, further, the Commission, after full hearing and argument, on June 5, 1916, made and filed its report and order requiring the carriers on or before September 1, 1916, to readjust their rates on the Schedule C Commodities under the rules and restrictions applicable to Schedule B commodities, and required the readjustment of rates on barley, beans, canned goods, asphaltum, dried fruit and wine from California ports to eastern seaboard points in conformity with the long-and-short-haul clause of the fourth section of the act to regulate commerce;

Whereas, further, When tariffs were filed with the Commission containing rates alleged to have been constructed in accordance with the order of the Commission, many shippers protested against the

proposed rates, alleging that they were unjust, unreasonable or otherwise unlawful and these rates were suspended by the Commission, by appropriate order, until December 31, 1916, the proceeding in connection therewith being known as Investigation and Suspension

Docket No. 909;

154 Whereas, further, by petition filed September 9, 1916, the Merchants' Association of Spokane, Wash., alleges that there is not now and has not been since June 5th, 1916, any water competition between the Atlantic and Pacific coasts of the United States, and that there is now no justification for the maintenance of lower rates on any commodities from eastern defined territories to Pacific coast ports than to intermediate points, and asks that the fourth section applications relating to westbound rates on all commodities be reopened, hearing and investigation had, and such order made as the changed conditions shown may justify;

It is therefore ordered, that fourth section applications Nos. 205, 342, 343, 344, 349, 350, 352 and 10336 respecting rates on commodities from eastern defined territories to Pacific coast terminals and intermediate points, and applications Nos. 9813, 10110, 10126, 10155, 10186 and 10189 respecting rates on barley, beans, canned goods, asphaltum, dried fruit and wine from California ports via rail and water through Galveston to Atlantic seaboard points be reopened for further hearing respecting changed conditions that are alleged to justify other and different orders than those entered;

It is further ordered, that therewith fourth section applications Nos. 345, 346, 347, 348, 349 and 1575 filed by R. H. Countiss, Agent, on behalf of carriers, parties to his tariffs, named in said applications respecting rates on classes and commodities from Pacific coast points to territory east thereof, and Investigation and Suspension Docket No. 909, and the rehearing of applications respecting rates on commodities from eastern defined territories to Pacific coast points and rates on barley, beans, canned goods, asphaltum, dried fruit and wine from California ports to Atlantic seaboard points

155 be consolidated and assigned for hearing before Examiner-Attorney Thurtell at Chicago, Ill., on November 20, 1916, at Salt Lake City, Utah, November 28, 1916, at San Francisco, Cal., December 4, 1916, at Portland, Ore., December 11, 1916, and at Spokane, Wash., December 14, 1916.

By the Commission:

[SEAL.]

GEORGE B. MCGINTY, *Secretary.*

## VI.

Thereafter on November 13, 1916, the Interstate Commerce Commission made an order and thereby attempted to postpone until the further order of the Commission its aforesaid order of June 5, 1916, as amended on July 13, 1916, the effective date of which the Commission heretofore attempted to postpone until December 30, 1916, as alleged in paragraph IV hereof, which order of November 13, 1916, was in words and figures as follows:

## Interstate Commerce Commission.

*Order.*

At a General Session of the Interstate Commerce Commission, Held at Its Office, in Washington, D. C., on the 13th Day of November, A. D. 1916.

In the Matter of Reopening Fourth Section Applications Nos. 205, 342, 343, 344, 349, 350, 352, and 10336, filed by R. H. Countiss, Agent, on behalf of various transcontinental carriers for authority to continue lower rates on certain commodities from eastern defined territory to Pacific Coast Ports than the rates contemporaneously applicable on like traffic to intermediate points;  
156 and In the Matter of reopening Fourth Section applications Nos. 9813, 1110, 10126, 10155, 10186, and 10189, filed by R. H. Countiss, Agent, on behalf of the Southern Pacific Company Atlantic Steamship Lines, The Atchison, Topeka & Santa Fe Railway Company, and Mallory Steamship Company respecting rates on barley, beans, canned goods, asphaltum, dried fruit, and wine from California ports to points on the Atlantic Seaboard which are lower than the rates contemporaneously applicable from intermediate points, 40 I. C. C., 35.

Upon further consideration of the record in the above-entitled case:

It is ordered, that the order entered in the above-entitled case on June 5, 1916, as amended on July 13, 1916, the effective date of which has been heretofore postponed until December 30, 1916, be, and the same is hereby postponed until further order of the Commission.

By the Commission:

[SEAL.]

GEORGE B. MCGINTY, *Secretary.*

After Supplement No. 11 to Tariff 4-M had been issued as alleged in paragraph XXIV of the petition, and had been filed in the manner provided by law with the Interstate Commerce Commission, the said order of the latter of June 5, 1916, as amended July 13, 1916, became on September 1, 1916, functus officio and the Commission went beyond its lawful powers in attempting to postpone beyond December 30, 1916, until further order of the Commission the effective date of the aforesaid order of June 5, 1916, as amended  
157 on July 13, 1916, and said order of November 13, 1916, was and is invalid, null and void and of no binding force and effect.

## VII.

On or about November 14, 1916, the Interstate Commerce Commission authorized the defendant carriers and other transcontinental railroads to cancel all of the protested west-bound rates, including those



on iron and steel articles in carloads from Pittsburgh and other points in eastern defined territory to Seattle and other Pacific coast ports which were suspended by the Commission in its orders in Investigation and Suspension Docket No. 909 and in consequence canceled the hearings which had been set on the suspended rates. On November 14, 1916, the Commission announced that the transcontinental railroads proposed to file tariffs to become effective December 30, 1916, applicable upon the so-called "Schedule C" commodities (including iron and steel articles in carloads moving from Pittsburgh and other points in eastern defined territory to Seattle and other Pacific coast ports) named in the tariffs suspended in I. & S. Docket No. 909, which would increase the present rates to the Pacific coast ports a maximum of 10 cents per 100 pounds on carload traffic but without any changes to Spokane and other intermountain points so-called from eastern groups including Pittsburgh. The Commission further announced at the same time that the proposed tariffs would diminish to the extent of the increases to the Pacific coast ports the discrimination which in its report of June 5, 1916, (set forth verbatim on pages 28 to 39 inclusive of the petition) it found to exist between Pacific coast ports and intermountain cities and which in its said order of June 5, 1916, as amended by its order of July 13, 1916, it ordered and required the defendant carriers and other transcontinental carriers parties to Tariff 4-M and the supplements thereto to remove. These announcements by the Commission were contained in a notice issued November 14, 1916, in words and figures as follows, namely:

I. & S. No. 909.

Interstate Commerce Commission.

Washington, D. C.,

Nov. 14, 1916.

Investigation and Suspension Docket No. 909.

*Trans-Continental Case.*

The Commission has granted authority to the Trans-Continental Lines to cancel all of the protested eastbound and westbound rates between points on the Pacific Coast and intermountain territory on the one hand and points in eastern defined territory on the other hand, contained in Trans-Continental tariffs which were suspended by the Commission in its orders in Investigation and Suspension Docket No. 909, in consequence of which the hearings on the suspended rates set for Chicago, November 20, Salt Lake City, November 28, San Francisco, December 4, Portland, Oreg., December 11, and Spokane, Wash., December 14, 1916, before Attorney-Examiner Thurtell have been canceled.

Hearings on Fourth Section Applications Nos. 205 etc., respecting

rates on commodities from eastern defined territory to Pacific coast points and intermediate points, and Fourth Section Applications Nos. 9813, etc., respecting rates on barley, beans, canned goods, asphaltum, dried fruits, wine and other commodities from Pacific coast ports to eastern destinations, set for the same places and dates will be held as scheduled.

It is understood that the Trans-Continental Lines propose to file tariffs effective upon statutory notice December 30th, 1916, applicable upon the so-called "Schedule C" commodities named in the tariffs suspended in I. & S. Docket No. 909, which will increase the present rates to the Pacific coast ports a maximum of 10 cents per 100 pounds on carloads and 25 cents per 100 pounds on less-than-carload traffic, but no changes to intermountain points from eastern groups A to E inclusive are contemplated, hence the discriminations under the fourth section now existing between Pacific coast ports and intermountain cities will be diminished to the extent of the increases to the Pacific coast ports. Rates from Missouri River and groups west thereof to intermountain cities taking maximum rates will be increased to the level of the rates to the Pacific coast ports, the maximum increases being 10 cents per 100 pounds on carloads and 25 cents per 100 pounds on less-than-carloads. It is also understood that the eastbound carload rates on asphaltum, barley, beans, canned goods, dried fruit and wine, from Pacific coast ports will be increased 10 cents per 100 pounds.

By the Commission:

GEORGE B. MCGINTY, *Secretary.*

### VIII.

Thereafter the defendant carriers and other carriers parties to Tariff 4-M and Supplements thereto (more particularly described on page 22 of the petition) issued on November 18, 1916, and filed with the Commission Supplement No. 18 to said Tariff 4-M, which supplement is noted to become effective December 30, 1916. Supplement No. 18 publishes increased rates on divers iron and steel articles from Pittsburgh and many other points in the United States east of the Missouri River to Seattle and other Pacific coast ports, by reason of which on and after December 30, 1916, the rates thereon will be 75 cents per hundred pounds for divers minimum carload weights. The increases proposed on iron and steel articles generally from Pittsburgh to Seattle amount to 10 cents per hundred pounds, or approximately 16% of the present rate of 65 cents. These increased rates on iron and steel articles are shown on pages 32 to 43 inclusive of Supplement No. 18 opposite items numbered 1776 D, 1784 B, 1788 B, 1802 A, 1808 A, 1834 A, 1836 A, 1838 A, 1840 A, 1842 A, 1846 B, 1868 A and 1870 A.

Supplement No. 18 purports to contain rates that are higher for shorter distances than for longer distances over the same route and such departure from the terms of the amended fourth section of the act to regulate commerce is pretended to be permitted by authority of the Interstate Commerce Commission's fourth section order No. 124 of April 30, 1915, (referred to on page 11 of the petition) as

amended by the Commission's said orders of June 5, 1916, and July 13, 1916, notwithstanding prior to November 18, 1916, as aforesaid the Interstate Commerce Commission had attempted to postpone until further order of the Commission its said order of June 5, 1916, as amended on July 13, 1916, the effective date of which the Commission had theretofore attempted to postpone until December 30, 1916, and notwithstanding the Commission has not attempted since November 13, 1916, to fix and establish a date for said order as amended to go into effect, and your petitioner avers that the defendant carriers and other carriers parties to Tariff 4-M and supplements thereto issued Supplement No. 18 in supposed compliance with the requirements of the Commission's aforesaid order of June 5, 1916, as amended by its order of July 13, 1916.

### IX.

Your petitioner on December 11, 1916, forwarded by telegraph to the Interstate Commerce Commission a complaint requesting the Commission to enter upon a hearing concerning the propriety of the proposed increased rates on iron and steel articles published in

Supplement No. 18 and pending such hearing and decision  
 161 thereon to suspend the operation of Supplement No. 18 in so far as the items showing increased rates on iron and steel articles were concerned, which complaint and request for suspension were in words and figures as follows, namely :

#### *"Night Letter.*

Portland, Oregon,

December 11, 1916.

Interstate Commerce Commission, Washington, D. C. :

Undersigned is Washington corporation. Principal place business Seattle. Engaged in building steel ships. Buys raw material consisting largely steel plates, shapes, bars, rivet rounds principally Pittsburgh. Has outstanding contracts to purchase approximately seventy-five thousand tons for delivery after December thirty, nineteen sixteen. Contracts all provide amount of any increases in freight shall be added to prices of material thereafter shipped. Undersigned was compelled to make contracts subject to possible increases in freight rates. Conditions in steel industry such for over year that contracts to purchase could be made only for very distant deliveries running from six months to more than year after date of contract. Undersigned requests suspension pending hearing supplement eighteen to westbound tariff four M Countiss number ten twenty effective December thirty, nineteen sixteen, in respect of following items: seventeen seventy-six D, seventeen eighty-four B, seventeen eighty-eight B, eighteen naught two A, eighteen naught eight A, eighteen thirty-four A, eighteen thirty-six A, eighteen thirty-eight A, eighteen forty A, eighteen forty-two A, eighteen forty-six B, eighteen

sixty-eight A and eighteen seventy A. Items protested substantially increase present rates and proposed rates are unreasonable. Increased rates proposed violate last paragraph fourth section because  
162 present rates on Schedule C commodities including items protested to Seattle and other coast cities were reduced in competition with water routes, Commission has found water competition has been eliminated, and no hearing has been had by Commission, to determine whether proposed increases rest upon changed conditions other than elimination of water competition. Increases proposed do not rest on changed conditions other than elimination water competition. Increases amount to practically sixteen percent of present rate. Loss to undersigned on outstanding contracts for delivery after December thirty, nineteen sixteen solely from increased rates protested will approximate one hundred and fifty thousand dollars.

SKINNER AND EDDY CORPORATION."

The Interstate Commerce Commission has not granted your petitioner's request for a suspension of Supplement No. 18 in so far as the same published increased rates on iron and steel articles.

X.

Since the petition was filed your petitioner has launched two ships and has commenced the erection of three more. Prior to November 18, 1916, your petitioner contracted to purchase in Pittsburgh and other points in Pennsylvania large quantities of steel plates, shapes, bars, rivet rounds and miscellaneous iron and steel articles. Your petitioner purchased this material f. o. b. cars at Pittsburgh and it has been, or will be shipped over the lines of railroad of the defendant carriers, whose charges for the transportation of the same have been, or will be borne by your petitioner. Part of this material has been delivered but your petitioner has under contract to purchase approximately 75,000 tons which the seller has not delivered and which the seller is not obligated by these contracts to deliver prior to December 30, 1916, and your petitioner is and will be unable to  
163 obtain delivery of any part thereof prior to December 30, 1916. The demand for steel has been so great for the past year that the manufacturers thereof would not agree to sell plates and other raw material above mentioned to your petitioner or other persons except for deliveries far in the future, running from six months to over a year after the date of the contract. Your petitioner has undertaken and agreed to build, sell and deliver during the years 1917 and 1918 certain completed ships and the 75,000 tons of material above mentioned were and are required for the construction of said ships. If the proposed increased rates on iron and steel articles go into effect on December 30, 1916, your petitioner will be compelled to pay in transportation charges on material to be delivered after that date approximately \$150,000 more than the charges it would be compelled to pay computed upon the basis of the rates now in effect. No ships are engaged in traffic by water

from the Atlantic coast through the Panama Canal to Seattle at the present time and it is wholly impossible for your petitioner to obtain the transportation by water of the material which it is under contract to purchase for delivery after December 30, 1916.

## XI.

On November 18, 1916 when Supplement No. 18 to Tariff 4-M was issued the Panama Canal was open for traffic but actual substantial competition by water through the Canal was eliminated to the same extent as it was on September 27, 1915 and on March 1, 1916. The increases in rates proposed in Supplement No. 18 to Tariff 4-M on Schedule C commodities including iron and steel articles from Pittsburgh and other eastern defined territory to Seattle and other Pacific coast ports do not rest on changed conditions other than the elimination of water competition in the situation with respect to the transportation of west-bound transcontinental traffic and no changes in conditions with respect to the transportation of this traffic other than the elimination of water competition have taken place since April 10, 1916 when the rate of 65 cents from Pittsburgh to Seattle and other Pacific coast ports on iron and steel articles became effective.

No hearing has been held by the Interstate Commerce Commission to determine whether the increased rates published in Supplement No. 18 to Tariff 4-M to Pacific coast ports rest upon changed conditions other than the elimination of water competition. Nevertheless the Interstate Commerce Commission by its said order of June 5, 1916 as amended by its order of July 13, 1916 attempted to authorize the defendant carriers and other transcontinental railroads to increase their rates on Schedule C commodities, including iron and steel articles, from Pittsburgh and other eastern defined territory to Seattle and other Pacific coast ports in violation of the last paragraph of Section 4 of the act to regulate commerce and the said orders, so far as they attempted or pretended to authorize or permit the rail carriers to increase their west-bound transcontinental rates to Pacific coast ports without a prior hearing by the Commission to determine whether such proposed increases rested upon changed conditions other than the elimination of water competition, were and are wholly void. The defendant carriers are parties to Tariff 4-M and to Supplement No. 18 thereof and unless restrained by a decree of this court will exact and collect on and after December 30, 1916 from your petitioner for the transportation of iron and steel articles in carloads from Pittsburgh to Seattle rates of 75 cents per hundred pounds in lieu of the present rates of 65 cents per hundred pounds and your petitioner will be compelled to pay the charges so exacted unless the orders aforesaid of June 5, 1916 and of July 13, 1916 of the Interstate Commerce Commission, so far as they attempted or pretended to permit the defendant carriers and other transcontinental carriers to increase their west-bound rates on Schedule C commodities, including iron and steel articles, be set aside, and unless the Commission be enjoined from attempt-

165 ing or undertaking to fix or establish a date for its said order of June 5, 1916 as amended July 13, 1916 to go into effect or to take any steps to enforce its said order of June 5, 1916 as amended July 13, 1916, and unless the defendant rail carriers be restrained from putting into effect and thereafter collecting and exacting the increased rates on iron and steel articles in carloads from Pittsburgh to Pacific coast ports, your petitioner will suffer great and irreparable injury and damage, and enormous and ruinous financial loss will result to its business enterprise above mentioned, to the manifest wrong and injury of your petitioner, which has no plain, speedy or adequate remedy at law in the premises.

Wherefore your petitioner prays:

1. That this Honorable Court grant an interlocutory order temporarily restraining and enjoining the Interstate Commerce Commission from fixing or establishing any date for its said order of June 5, 1916 as amended July 13, 1916 to go in to effect and suspending and setting aside said order of June 5, 1916 as amended July 13, 1916, and restraining the enforcement thereof so far as the same undertook or attempted or purported to permit the transcontinental rail carriers to increase their west-bound rates on iron and steel articles from Pittsburgh to Pacific coast ports, and restraining the defendant carriers from collecting or exacting on or after December 30, 1916, the increased rates on iron and steel articles in carloads from Pittsburgh to Pacific coast ports published in Supplement No. 18 to Tariff 4-M or any rates thereon in excess of the rates now in effect until the Interstate Commerce Commission shall have held a hearing to determine whether the proposed increases rest upon changed conditions other than the elimination of water competition, and restraining the Interstate Commerce Commission and the defendant carriers from taking any steps or instituting any proceedings to enforce that portion of the order of June 5, 1916, 166 as amended July 13, 1916, relating to west-bound rates on iron and steel articles in carloads.

2. That this Honorable Court grant unto your petitioner a restraining order conformable to the prayer of this supplemental petition, to be directed to the defendants commanding them to be and appear before this Court on a day certain therein to be named then and there to show cause why such interlocutory injunction should not be granted and restraining the defendants and each of them, their officers, agents, servants and representatives and all persons acting by or under the authority of them or any of them in any manner from proceeding or attempting to enforce the said order of the Interstate Commerce Commission of June 5, 1916, as amended July 13, 1916, so far as the same attempted or purported to permit the transcontinental carriers to increase their rates on iron and steel articles moving west-bound in carloads from Pittsburgh and other eastern defined territory to Pacific coast ports and from charging, collecting or exacting from your petitioner the proposed increased rates on iron and steel articles in carloads from Pittsburgh to Seattle, until the hearing upon the application of your petitioner for an interlocutory injunction.

3. That upon final hearing of this cause a decree be entered making such temporary or interlocutory injunction perpetual and final and setting aside and annulling said order of the Interstate Commerce Commission of June 5, 1916, as amended July 13, 1916, so far as it permitted or attempted or undertook or purported to permit the trans-continental carriers to increase their rates on iron and steel articles west-bound from Pittsburgh and other eastern defined territory to

Pacific coast ports and perpetually enjoining the defendant  
167 carriers from charging, collecting or exacting from your petitioner the proposed increased rates on iron and steel articles in carloads from Pittsburgh to Seattle.

4. That your petitioner may recover herein its costs and disbursements and may have such other and further relief in the premises as the nature and circumstances of the case may require and as may be conformable to equity.

To the end that your petitioner may obtain the relief to which it is justly entitled in the premises your petitioner prays that this Honorable Court may grant to your petitioner an order directed to the defendants and each of them requiring and commanding them and each of them to appear herein and answer (but not under oath, answer under oath being hereby expressly waived) the several allegations in this, your petitioner's supplemental petition and that your petitioner may have such other and further additional relief as to this Honorable Court may seem just and proper.

JOSEPH N. TEAL,

WILLIAM C. McCULLOCH,

*Solicitors for Petitioner.*

TEAL, MINOR & WINFREE,

*Portland, Oregon;*

L. B. STEDMAN,

*Seattle, Washington;*

W. E. CREED,

*San Francisco, California,*

*Of Counsel.*

168 STATE OF OREGON,

*County of Multnomah, ss:*

I, John W. Eddy, being first duly sworn according to law, depose and say: I am the vice-president of Skinner and Eddy Corporation, the petitioner in the above entitled suit. I have read the foregoing supplemental petition and am familiar with the contents thereof, and the same is true to my knowledge. I make this affidavit on behalf of the petitioner because the president of the petitioner is out of the state of Oregon.

JOHN W. EDDY.



Subscribed and sworn to before me this 16th day of December, 1916.

[SEAL.]

WILLIAM C. McCULLOCH,  
*Notary Public in and for Oregon,*  
*Residing at Portland.*

My commission will expire September 13, 1919.

Filed December 16, 1916. G. H. Marsh, Clerk.

169 And afterwards, to wit, on Saturday, the 16th day of December, 1916, the same being the 35th Judicial day of the Regular November, 1916, Term of said Court; present the Honorable Charles E. Wolverton United States District Judge, presiding, the following proceedings were had in said cause, to-wit:

170 *Return on Service of Writ.*

UNITED STATES OF AMERICA,  
*District of Oregon, ss:*

I hereby certify and return that I served Order to show cause on the therein-named Pennsylvania Company by handing to and leaving a true and correct copy thereof together with the copy of the Supplemental Petition with J. S. Campbell as District Freight & Passenger Agent for said Pennsylvania Company by Herbert Rowland his Clerk in charge during the absence of said J. S. Campbell as Agent for the above named Company personally at Portland in said District on the 18 day of December, A. D. 1916.

JOHN MONTAG,  
*U. S. Marshal,*  
By G. E. JACKSON, *Deputy.*

Filed December 19, 1916. G. H. Marsh, Clerk.

171 *Return on Service of Writ.*

UNITED STATES OF AMERICA,  
*District of Oregon, ss:*

I hereby certify and return that I served Order to show cause on the therein-named Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company by handing to and leaving a true and correct copy thereof together with the copy of the supplemental petition with J. S. Campbell as District Freight & Passenger Agent for the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company by Herbert Rowland his Clerk in charge during absence of said J. S. Campbell as such named Agent for the above named Railway Company

personally at Portland in said District on the 18 day of December, A. D. 1916,

JOHN MONTAG,

*U. S. Marshal,*

By G. E. JACKSON, *Deputy.*

Filed December 19, 1916. G. H. Marsh, Clerk.

172

*Return on Service of Writ.*

UNITED STATES OF AMERICA,

*District of Oregon, ss:*

I hereby certify and return that I served Order to show cause on the therein-named Pennsylvania Company by handing to and leaving a true and correct copy thereof together with the copy of the supplemental petition with J. S. Campbell as Agent for the Pennsylvania Company by Herbert Rowland his Clerk in charge during the absence of J. S. Campbell as Agent for the above named Company personally at Portland in said District on the 18 day of December, A. D. 1916,

JOHN MONTAG,

*U. S. Marshal,*

By D. B. FULLER, *Deputy.*

Filed December 19, 1916. G. H. Marsh, Clerk.

173

*Order to Show Cause.*

In the District Court of the United States for the District of Oregon.

SKINNER AND EDDY CORPORATION, Petitioner,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, The Baltimore and Ohio Railroad Company, Bessemer and Lake Erie Railroad Company, Chicago, Burlington and Quincy Railroad Company, Chicago and Northwestern Railway Company, Chicago, Milwaukee and St. Paul Railway Company, The Great Northern Railway Company, Illinois Central Railroad Company, The New York Central Railroad Company, The New York, Chicago and St. Louis Railroad Company, Northern Pacific Railway Company, Oregon Short Line Railroad Company, Oregon-Washington Railroad & Navigation Company, Pennsylvania Company, The Pittsburgh and Lake Erie Railroad Company, The Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company, and Union Pacific Railroad Company, Defendants.

Upon reading and considering the verified supplemental petition herein, good cause appearing therefor, it is

Ordered that jurisdiction of this cause is assumed and the supplemental petition is sanctioned and directed to be filed in the office of the clerk of this court, and it is

Ordered further that the defendants named in the supplemental petition and each of them are commanded and required to appear before this Court on December 29, 1916 at ten o'clock in the forenoon or as soon thereafter as counsel can be heard at the United

174 States court-room in the City of Portland, State and District of Oregon then and there to show cause, if any they can, why a restraining order and injunction should not issue against them as prayed in the supplemental petition, and it is

Ordered further that at least five days' notice of this hearing shall be given by petitioner's solicitors to the defendants, and it is

Ordered further that the supplemental petition and this order be served upon each of the defendants by delivering copies thereof certified by petitioner's solicitors either to the solicitors of record who have entered their appearance for certain of the defendants in this cause or to any officer or agent of the respective defendants within the State and District of Oregon or within the District of Columbia, provided that such service if it be made within the District of Columbia shall be made by the marshal of the Supreme Court of the District of Columbia, and it is

Ordered further that the defendants file their respective answers or other defenses in the Clerk's office on or before the twentieth day after service of this order and of the supplemental petition, excluding the day of service.

Dated and signed at Portland in the State and District of Oregon this 16th day of December, 1916.

CHAS. E. WOLVERTON,  
*District Judge.*

Filed December 16, 1916. G. H. Marsh, Clerk, by K. F. Frazer, Deputy.

175 *Return of United States Marshal of Service of Within Papers.*

I, Maurice Splain, United States Marshal in and for the District of Columbia, do hereby certify that I served copies of the within Rule to Show Cause and Supplemental Petition in Equity Cause Number 7229 in the District Court of the United States for the District of Oregon entitled Skinner and Eddy Corporation vs. United States of America, et als., upon the defendants, the Baltimore and Ohio Railroad Company by delivery of copies thereof to Samuel B. Hege, 12-23-16, Statutory Agent; Bessemer and Lake Erie Railroad Company by delivery of copies of same to W. N. Akers, 12-22-16, Statutory Agent; and defendants, Pennsylvania Company and Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company by delivery of copies to F. D. McKenney, 12-22-16, Statutory Agent; this 23rd day of December, 1916.

MAURICE SPLAIN,  
*United States Marshal for the District of Columbia.*

Filed January 4, 1917. G. H. Marsh, Clerk, District of Oregon.

176 And afterwards, to wit, on Friday, the 29th day of December, 1916, the same being the 46th judicial day of the Regular November, 1916, term of said Court; present the Honorable William B. Gilbert, United States Circuit Judge, and the Honorable Charles E. Wolverton and the Honorable Robert S. Bean, District Judges, the following proceedings were had in said cause, to-wit:

177 *Order.*

In the District Court of the United States for the District of Oregon.

In Equity.

No. 7229.

*No. 7229.*

SKINNER AND EDDY CORPORATION, Petitioner,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, THE BALTIMORE AND OHIO RAILROAD COMPANY, et al.,  
Defendants.

December 29, 1916.

This cause came on duly to be heard this 29th day of December, 1916, before William B. Gilbert, Circuit Judge, and Charles E. Wolverton and Robert S. Bean, District Judges, petitioner appearing by J. N. Teal, its solicitor, and the defendant The United States of America appearing by Blackburn Esterline, its solicitor, the defendant Oregon-Washington Railroad and Navigation Company and others appearing by Arthur C. Spencer, their solicitor, and the defendant the Northern Pacific Railway Company and others appearing by James B. Kerr, their solicitor:

Whereupon the petitioner presented to the Court its application for a temporary or interlocutory order suspending orders of the Interstate Commerce Commission mentioned in the prayer of the petition herein and restraining the defendant Railroad Companies from enforcing or collecting the rates on iron and steel articles from Pittsburgh and other eastern defined territory to Pacific Coast terminals under Supplement 18 to Transcontinental Tariff No. 4-M, I. C. C. No. 1020, described in the petition therein, and thereupon argument was heard in support of and in opposition to said application, and the Court being advised in the premises, and being of the opinion that said orders of the Interstate Commerce Commission were within the jurisdiction and authority of that body, and that the tariffs so sought to be enjoined have been filed according to law and in pursuance of the authority of said orders of the Interstate Commerce Commission and with the consent of said Commission: Now, therefore, be it

Ordered that said application for a temporary injunction or interlocutory restraining order be and the same is hereby denied.

By the Court:

WM. B. GILBERT,  
*Circuit Judge.*

CHAS. E. WOLVERTON,  
R. S. BEAN,  
*District Judges.*

Filed December 29, 1916. G. H. Marsh, Clerk.

179 And afterwards, to wit, on Friday, the 29th day of December, 1916, the same being the 46th judicial day of the Regular November, 1916, term of said Court; present the Honorable William B. Gilbert, United States Circuit Judge, and the Honorable Charles E. Wolverton and the Honorable Robert S. Bean, District Judges, the following proceedings were had in said cause, to-wit:

180 *Order.*

In the District Court of the United States for the District of Oregon.

In Equity.

No. 7229.

SKINNER AND EDDY CORPORATION

VS.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, THE BALTIMORE AND OHIO RAILROAD COMPANY, et al.,  
Defendants.

December 29, 1916.

Without prejudice to the rights of any of the parties on the question of jurisdiction or otherwise, it is now in open court ordered:

That the time within which the United States and the Interstate Commerce Commission may file their motions, answers, or other pleadings be and the same is hereby extended to and including February first, nineteen hundred seventeen.

181 And afterwards, to wit, on the 29th day of December, 1916, there was duly filed in said Court a Motion of The Great Northern Railway Company and Northern Pacific Railway Company to dismiss the Supplemental Petition, in words and figures as follows, to wit:

182      *Motion to Dismiss Supplemental Petition.*

In the District Court of the United States for the District of Oregon.

In Equity.

No. 7229.

SKINNER AND EDDY CORPORATION, Petitioner,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, The Baltimore and Ohio Railroad Company, Bessemer and Lake Erie Railroad Company, Chicago, Burlington and Quincy Railroad Company, Chicago and Northwestern Railway Company, Chicago, Milwaukee and St. Paul Railway Company, The Great Northern Railway Company, Illinois Central Railroad Company, The New York Central Railroad Company, The New York, Chicago, and St. Louis Railroad Company, Northern Pacific Railway Company, Oregon Short Line Railroad Company, Oregon-Washington Railroad & Navigation Company, Pennsylvania Company, The Pittsburgh and Lake Erie Railroad Company, The Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company, and Union Pacific Railroad Company, Defendants.

Come now the defendants The Great Northern Railway Company and Northern Pacific Railway Company and move the Court to dismiss the Supplemental Petition herein upon the ground that it appears upon the face of said Supplemental Petition and upon the face of the original Petition filed herein that insufficient facts are therein stated to constitute a valid cause of action in equity.

CHARLES H. CAREY &  
JAMES B. KERR,

*Solicitors for Defendants The Great Northern Railway Company and Northern Pacific Railway Company.*

Filed December 29, 1916. G. H. Marsh, Clerk, by K. F. Frazer, Deputy.

183      And afterwards, to wit, on the 29th day of December, 1916, there was duly Filed in said Court, a Motion of The New York, Chicago and St. Louis Railroad Company to Dismiss the Supplemental Petition, in words and figures as follows, to wit:

184      *Motion to Dismiss Supplemental Petition.*

In the District Court of the United States for the District of Oregon.

In Equity.

No. 7229.

SKINNER AND EDDY CORPORATION, Petitioner,

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, The Baltimore and Ohio Railroad Company, Bessemer and Lake Erie Railroad Company, Chicago, Burlington and Quincy Railroad Company, Chicago and Northwestern Railway Company, Chicago, Milwaukee and St. Paul Railway Company, The Great Northern Railway Company, Illinois Central Railroad Company, The New York Central Railroad Company, The New York, Chicago, and St. Louis Railroad Company, Northern Pacific Railway Company, Oregon Short Line Railroad Company, Oregon-Washington Railroad and Navigation Company, Pennsylvania Company, The Pittsburgh and Lake Erie Railroad Company, The Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company, and Union Pacific Railroad Company, Defendants.

Comes now the defendant The New York, Chicago and St. Louis Railroad Company and moves the Court to dismiss the Supplemental Petition herein upon the ground that it appears upon the face of said Supplemental Petition and upon the face of the original petition filed herein that insufficient facts are therein stated to constitute a valid cause of action in equity.

CHARLES H. CAREY AND  
JAMES B. KERR,

*Solicitors for Defendant The New York,  
Chicago and St. Louis Railroad Company.*

185      STATE OF OREGON,  
            *County of Multnomah, ss:*

Due service of the within Motion is hereby accepted at Portland this — day of December, 1916, by receiving a copy thereof, duly certified to as such by James B. Kerr, of attorneys for defendants.

JOSEPH N. TEAL,  
*Of Attorneys for Petitioners.*

Filed, December 29, 1916. G. H. Marsh, Clerk.

186      And afterwards, to wit, on the 29th day of December, 1916, there was duly Filed in said Court, a Motion of The  
7—546



New York Central Railroad Company and The Pittsburgh and Lake Erie Railroad Company, to dismiss the Supplemental Petition, in words and figures as follows, to wit:

187            *Motion to Dismiss Supplemental Petition.*

In the District Court of the United States for the District of Oregon.

In Equity.

No. 7229.

SKINNER AND EDDY CORPORATION, Petitioner,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, The Baltimore and Ohio Railroad Company, Bessemer and Lake Erie Railroad Company, Chicago, Burlington and Quincy Railroad Company, Chicago and Northwestern Railway Company, Chicago, Milwaukee and St. Paul Railway Company, The Great Northern Railway Company, Illinois Central Railroad Company, The New York Central Railroad Company, The New York, Chicago, and St. Louis Railroad Company, Northern Pacific Railway Company, Oregon Short Line Railroad Company, Oregon-Washington Railroad and Navigation Company, Pennsylvania Company, The Pittsburgh and Lake Erie Railroad Company, The Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company, and Union Pacific Railroad Company, Defendants.

Come now the defendants The New York Central Railroad Company and The Pittsburgh and Lake Erie Railroad Company and move the Court to dismiss the Supplemental Petition herein upon the ground that it appears upon the face of said Supplemental Petition and upon the face of the original Petition filed herein that insufficient facts are therein stated to constitute a valid cause of action in equity.

CHARLES H. GAREY &  
JAMES B. KERR,

*Solicitors for Defendants The New York  
Central Railroad Company and The  
Pittsburgh and Lake Erie Railroad  
Company.*

188    STATE OF OREGON,  
          *County of Multnomah, ss:*

Due service of the within Motion is hereby accepted at Portland this — day of December, 1916, by receiving a copy thereof, duly certified to as such by James B. Kerr, of Attorneys for defendants.

JOSEPH N. TEAL,  
*Of Attorneys for Petitioner.*

Filed, December 29, 1916. G. H. Marsh, Clerk.

189 And afterwards, to wit, on the 29th day of December, 1916, there was duly Filed in said Court, a Motion of the Chicago and Northwestern Railway Company, Chicago, Burlington and Quincy Railroad Company, Illinois Central Railroad Company, Union Pacific Railroad Company, Oregon Short Line Railroad Company, Oregon-Washington Railroad and Navigation Company, and Chicago, Milwaukee and St. Paul Railway Company, to dismiss supplemental Petition in words and figures as follows, to wit:

190

*Motion.*

In the District Court of the United States for the District of Oregon.

In Equity.

SKINNER AND EDDY CORPORATION, Petitioner,

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, The Baltimore and Ohio Railroad Company, Bessemer and Lake Erie Railroad Company, Chicago, Burlington and Quincy Railroad Company, Chicago and Northwestern Railway Company, Chicago, Milwaukee and St. Paul Railway Company, The Great Northern Railway Company, Illinois Central Railroad Company, The New York Central Railroad Company, The New York, Chicago and St. Louis Railroad Company, Northern Pacific Railway Company, Oregon Short Line Railroad Company, Oregon-Washington Railroad & Navigation Company, Pennsylvania Company, The Pittsburgh and Lake Erie Railroad Company, The Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company, and Union Pacific Railroad Company, Defendants.

The defendants, Chicago and Northwestern Railway Company, Chicago, Burlington and Quincy Railroad Company, Illinois Central Railroad Company, Union Pacific Railroad Company, Oregon Short Line Railroad Company, Oregon-Washington Railroad & Navigation Company, and Chicago, Milwaukee and St. Paul Railway Company, appearing by their solicitors herein, renew the motion to dismiss the original petition filed herein upon the grounds and for the reasons therein stated, and upon the same grounds move the court to dismiss the so-called supplemental petition filed herein, and move the court to dismiss both the petition and supplemental petition and to strike the latter from the files of this court, all upon the grounds and for the reasons following:

191 1st. That it appears upon the face of said petitions that the same do not nor does not nor does either of them nor do they together state sufficient facts to constitute a valid cause of action in equity or entitle the petitioner therein to the relief prayed for in said petitions, or either of them, or to any relief whatever.

2nd. It appears upon the face of said petitions that the order of

the defendant Interstate Commerce Commission of June 5th and July 13th, 1916, set forth in the original petition and of the orders supplemental thereto or amendatory thereof (set forth in said original petition and said so-called supplemental petition and each and all of them) were made upon or in consequence of the petition of the Merchants Association of Spokane, Washington, sometimes designated in said petitions as the Spokane Merchants Association, and of the Nevada Railroad Commission, neither of which are residents of the District of Oregon; that the residence of the former is in the state of Washington in the Eastern District of Washington, and of the latter in the State and District of Nevada; that said Association and Commission are necessary parties to this action and to the granting of the relief prayed for by the said petitions or for the granting of any relief with respect to the subject matter of this litigation, and this court is without jurisdiction to entertain said petitions or to hear, try, or determine the matters presented to this court by said petitioner in its said petition or supplemental petition or either of them, either with or without the presence of said Merchants Association of Spokane, Washington, and Nevada Railroad Commission, and that the proper venue for this action is either the Eastern District of the State of Washington or the District of Nevada.

192 3d. That the original petition in this case was directed against rates on iron and steel articles in carloads from Pittsburgh, Pa., to Pacific Coast Ports, published in Supplement No. 11 to tariff 4-M, and that said rates and said tariffs were suspended by the Interstate Commerce Commission on August 29th, 1916, and were, as appears from the so-called Supplemental Petition, withdrawn by the defendants above named prior to November 18, 1916, and that on said last named date another and different tariff specifying entirely different rates was filed by said defendants with the Interstate Commerce Commission, known and specified as Supplement No. 18 to Tariff 4-M; that said supplemental petition is directed against the tariff and rates last named and it therefore appears from the face of said petition and said supplemental petition that the subject matter of the latter is entirely new and different than the subject matter of the original petition, and the allegations made and relief sought by said supplemental petition are not germane to the original petition herein and are not the proper subject for a supplemental petition in this case.

H. A. SCANDRETT AND  
A. C. SPENCER,

*Solicitors for Chicago and Northwestern Railway Company, Chicago, Burlington and Quincy Railroad Company, Illinois Central Railroad Company, Union Pacific Railroad Company, Oregon Short Line Railroad Company, Oregon-Washington Railroad & Navigation Company.*

F. M. DUDLEY,  
*Solicitor for Chicago, Milwaukee and St. Paul Ry. Co.*

193 STATE OF OREGON,  
Multnomah County, ss:

I, ———, one of the solicitors for the — in the above entitled cause, do hereby certify that I have compared the foregoing copy of — with the original thereof, and that the same is a full, true and correct copy of such original, and of the whole thereof.

—————,  
Solicitor for —.

Service by copy admitted at —, 191-.

JOSEPH N. TEAL,  
Of Solicitors for Petitioners.

Filed, March 29, 1916. G. H. Marsh, Clerk.

194 And afterwards, to wit, on the 20th day of January, 1917, there was duly filed in said Court, a Motion of the Interstate Commerce Commission to dismiss the Supplemental Petition, in words and figures as follows, to wit:

195 *Motion by the Interstate Commerce Commission to Dismiss the Petition as Amended in the Above-entitled Cause.*

In the District Court of the United States for the District of Oregon.

In Equity.

No. 7229.

SKINNER AND EDDY CORPORATION, Petitioner,

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, The Baltimore and Ohio Railroad Company, Bessemer and Lake Erie Railroad Company, Chicago, Burlington and Quincy Railroad Company, Chicago and Northwestern Railway Company, Chicago, Milwaukee and St. Paul Railway Company, The Great Northern Railway Company, Illinois Central Railroad Company, The New York Central Railroad Company, The New York, Chicago and St. Louis Railroad Company, Northern Pacific Railway Company, Oregon Short Line Railroad Company, Oregon-Washington Railroad and Navigation Company, Pennsylvania Company, The Pittsburgh and Lake Erie Railroad Company, The Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company, and Union Pacific Railroad Company, Defendants.

Now comes the Interstate Commerce Commission, one of the defendants in the above entitled cause, and moves the court to dismiss the petition filed herein for the following reasons:

1. That the order in controversy was confessedly based upon applications for relief made by the carriers under the fourth section of the Act to regulate commerce, and the order of the Commission was permissive only; that the carriers are the only necessary parties to the proceeding before this defendant under said fourth section; that there is no provision in the Act to regulate commerce permitting shippers, or the petitioner herein to participate in hearings under the fourth section, or to become litigants therein, and there is no provision in the law for notice to shippers, or the petitioner herein, of such applications or orders; that the remedy accorded to shippers, or the petitioner herein, if they complain of the rate, is under sections 13 and 15 of said Act; therefore said petitioner has no standing as a litigant before the Commission and may not prosecute a suit in court to set aside a fourth-section order.

2. That the last paragraph in section 4, added by the Act of June 18, 1910, which provides:

Whenever a carrier by railroad shall in competition with a water route or routes reduce the rates on the carriage of any species of freight to or from competitive points, it shall not be permitted to increase such rates, unless after hearing by the Interstate Commerce Commission it shall be found that such proposed increase rests upon changed conditions other than the elimination of water competition, has no application in cases where this defendant is administering the long-and-short-haul clause of section 4 of the said Act.

Wherefore this defendant denies that the petitioner is entitled to the relief, or any part thereof, prayed for in said petition, and prays that the said petition be dismissed with costs.

INTERSTATE COMMERCE COMMISSION,  
By JOS. W. FOLK,  
CHAS W. NEEDHAM,  
*Its Counsel.*

Filed January 20, 1917. G. H. Marsh, Clerk.

197 And afterwards, to wit, on Monday, the 15th day of January, 1917, the same being the 60th judicial day of the Regular November, 1916, term of said Court; present the Honorable Robert S. Bean, United States District Judge, presiding, the following proceedings were had in said cause, to-wit:

198     *Decree Taking Petition and Supplemental Petition as  
              Confessed.*

In the District Court of the United States for the District of Oregon.

In Equity.

No. 7229.

SKINNER AND EDDY CORPORATION, Petitioner.

y.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, The Baltimore and Ohio Railroad Company, and Others,  
Defendants.

This cause came on to be heard on the oral motion of William C. McCulloch, one of the solicitors for petitioner for an order taking the petition and supplemental petition as confessed, and it appearing to the court that the subpoena in said cause has been returned, which return has been filed, and it appearing further that said subpoena and the petition in said cause and the order to show cause based thereon were duly served by the Marshal of the Supreme Court of the District of Columbia on The Baltimore and Ohio Railroad Company, one of the defendants herein, by the delivery on August 29, 1916, of duly certified copies of the same to Samuel B. Hege at his office in the city of Washington, District of Columbia, he being the agent designated by said defendant to the Interstate Commerce Commission as the person upon whom service of process shall be made under the provisions of Section 6 of the Act of Congress of June 18, 1910, entitled an Act to Create a Commerce Court, etc., and no appearance having been entered by said defendant nor any answer or other defense to said petition filed in the Clerk's office, although such appearance should have been entered or such answer or other defense

199 should have been filed in the Clerk's office on or before the 18th day of September, 1916, the same being the time fixed by the said subpoena, and it appearing further, that the *the* supplemental petition in said cause and the order to show cause based upon said supplemental petition were duly served by the Marshal of the Supreme Court of the District of Columbia on The Baltimore and Ohio Railroad Company by the delivery on December 23, 1916, of duly certified copies of the same to said Samuel B. Hege at his office in the city of Washington, District of Columbia, he being the agent designated by said defendant to the Interstate Commerce Commission as the person upon whom service of process shall be made under the provisions of Section 6 of the Act of Congress of June 18, 1910, entitled An Act to create a Commerce Court, etc., and no appearance having been entered by said defendant nor any answer or other defense to said supplemental petition filed in the Clerk's office although such appearance should have been entered or such answer or other

defense to said supplemental petition should have been filed in the Clerk's office on or before the 13th day of January, 1917, the same being the time fixed therefor by said order to show cause based upon said supplemental petition, therefore it is

Ordered and decreed that the petition and the supplemental petition be taken as confessed as to said The Baltimore and Ohio Railroad Company, one of the defendants.

R. S. BEAN,  
*District Judge.*

Dated at Portland, Oregon, January 15, 1917.

Filed, January 15, 1917. G. H. Marsh, Clerk.

200     *Decree Taking Petition and Supplemental Petition as Confessed.*

In the District Court of the United States for the District of Oregon.

In Equity.

No. 7229.

SKINNER AND EDDY CORPORATION, Petitioner,

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, The Baltimore and Ohio Railroad Company, and Others,  
Defendants.

This cause came on to be heard on the oral motion of William C. McCulloch, one of the solicitors for petitioner for an order taking the petition and supplemental petition as confessed, and it appearing to the court that the subpoena in said cause has been returned, which return has been filed, and it appearing further that said subpoena and the petition in said cause and the order to show cause based thereon were duly served by the Marshal of the Supreme Court of the District of Columbia on Bessemer and Lake Erie Railroad Company, one of the defendants herein, by the delivery on August 29, 1916, of duly certified copies of the same to W. N. Akers at his office in the city of Washington, District of Columbia, he being the agent designated by said defendant to the Interstate Commerce Commission as the person upon whom service of process shall be made under the provisions of Section 6 of the Act of Congress of June 18, 1910, entitled an Act to Create a Commerce Court, etc., and no appearance having been entered by said defendant nor any answer or other defense to said petition filed in the Clerk's office, although  
such appearance should have been entered or such answer or  
201     other defense should have been filed in the Clerk's office on  
or before the 18th day of September, 1916, the same being  
the time fixed by the said subpoena, and it appearing further that



the supplemental petition in said cause and the order to show cause based upon said supplemental petition were duly served by the Marshal of the Supreme Court of the District of Columbia on Bessemer and Lake Erie Railroad Company by the delivery on December 22, 1916, of duly certified copies of the same to said W. N. Akers at his office in the city of Washington, District of Columbia, he being the agent designated by said defendant to the Interstate Commerce Commission as the person upon whom service of process shall be made under the provisions of Section 6 of the Act of Congress of June 18, 1910, entitled An Act to Create a Commerce Court, etc., and no appearance having been entered by said defendant nor any answer or other defense to said supplemental petition filed in the Clerk's office although such appearance should have been entered or such answer or other defense to said supplemental petition should have been filed in the Clerk's office on or before the 13th day of January, 1917, the same being the time fixed therefor by said order to show cause based upon said supplemental petition, therefore it is

Ordered and decreed that the petition and the supplemental petition be taken as confessed as to said Bessemer and Lake Erie Railroad Company, one of the defendants.

R. S. BEAN,  
*District Judge.*

Dated at Portland, Oregon, January 15, 1917.

Filed January 15, 1917. G. H. Marsh, Clerk.

202 *Decree Taking Petition and Supplemental Petition as Confessed.*

In the District Court of the United States for the District of Oregon.

In Equity.

No. 7229.

SKINNER AND EDDY CORPORATION, Petitioner,

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, The Baltimore and Ohio Railroad Company, and Others,  
Defendants.

This cause came on to be heard on this 15th day of January, 1917, on the oral motion of William C. McCulloch, one of the solicitors for petitioner, for an order taking the petition and supplemental petition as confessed, and it appearing to the court that the subpoena in said cause has been returned, which return has been filed, and it appearing further that said subpoena and the petition in said cause and the order to show cause based thereon were duly served

by the Marshal of the Supreme Court of the District of Columbia on The Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company, one of the defendants herein, by the delivery on August 29, 1916, of duly certified copies of the same to F. D. McKenney, at his office in the city of Washington, District of Columbia, he being the agent designated by said defendant to the Interstate Commerce Commission as the person upon whom service of process shall be made under the provisions of Section 6 of the Act of Congress of June 18, 1910, entitled An Act to Create a Commerce Court, etc., and no appearance having been entered by said defendant nor any answer or other defense to said petition filed in the Clerk's office, although such appearance should have been entered or such answer or other defense should have been filed in the Clerk's office on or before the 18th day of September, 1916, the same being the time fixed by the said subpoena, and it appearing further that the supplemental petition in said cause and the order to show cause based upon said supplemental petition were duly served by the Marshal of the Supreme Court of the District of Columbia on The Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company by the delivery on December 22, 1916, of duly certified copies of the same to said F. D. McKenney at his office in the city of Washington, District of Columbia, he being the agent designated by said defendant to the Interstate Commerce Commission as the person upon whom service of process shall be made under the provisions of Section 6 of the Act of Congress of June 18, 1910, entitled An Act to Create a Commerce Court, etc., and it appearing further that said supplemental petition and the order to show cause based upon said supplemental petition were also duly served by the United States Marshal for the District of Oregon on said The Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company by the delivery on December 18, 1916, of duly certified copies of the same to Herbert Rowland personally, clerk in charge of the office of said John S. Campbell, said defendant's District Freight and Passenger Agent in the city of Portland, state and district of Oregon, during the temporary absence of said John S. Campbell out of said state and district, and no appearance having been entered by said defendant nor any answer or other defense to said supplemental petition filed in the Clerk's office although such appearance should have been entered or such answer or other defense to said supplemental petition should have been filed in the Clerk's office on or before the 13th day of January, 1917, the same being the time fixed therefor by said order to show cause based upon said supplemental petition, therefore it is

Ordered and decreed that the petition and the supplemental petition be taken as confessed as to said The Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company, one of the defendants.

R. S. BEAN, *District Judge.*

Dated at Portland, Oregon, January 15, 1917.

Filed, January 15, 1917. G. H. Marsh, Clerk.

205     *Decree Taking Petition and Supplemental Petition as  
   Confessed.*

In the District Court of the United States for the District of Oregon.

In Equity.

No. 7229.

SKINNER AND EDDY CORPORATION, Petitioner,

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, THE BALTIMORE AND OHIO RAILROAD COMPANY, and Others,  
Defendants.

This cause came on to be heard on this 15th day of January, 1917, on the oral motion of William C. McCulloch, one of the solicitors for petitioner for an order taking the petition and supplemental petition as confessed, and it appearing to the court that the subpoena in said cause has been returned, which return has been filed, and it appearing further that said subpoena and the petition in said cause and the order to show cause based thereon were duly served by the Marshal of the Supreme Court of the District of Columbia on Pennsylvania Company, one of the defendants herein, by the delivery on August 29, 1916, of duly certified copies of the same to F. D. McKenney at his office in the city of Washington, District of Columbia, he being the agent designated by said defendant to the Interstate Commerce Commission as the person upon whom service of process shall be made under the provisions of Section 6 of the Act of Congress of June 18, 1910, entitled An Act to Create a Commerce Court, etc., and it appearing further that said subpoena and said petition and said order to show cause were also duly served by the United States

206     Marshal for the District of Oregon on said Pennsylvania Company by the delivery on August 23, 1916, of duly certified copies of the same to John S. Campbell, personally, at his office in the city of Portland, state and district of Oregon, he being said defendant's District Freight and Passenger Agent in the city of Portland, state and district of Oregon, and no appearance having been entered by said defendant nor any answer or other defense to said petition filed in the Clerk's office, although such appearance should have been entered or such answer or other defense should have been filed in the Clerk's office on or before the 18th day of September, 1915, the same being the time fixed by the said subpoena, and it further appearing that the supplemental petition in said cause and the order to show cause based upon said supplemental petition were duly served by the Marshal of the Supreme Court of the District of Columbia on Pennsylvania Company by the delivery on December 22, 1916, of duly certified copies of the same to said F. D. McKenney at his office in the city of Washington, District of Co-

lumbia, he being the agent designated by said defendant to the Interstate Commerce Commission as the person upon whom service of process shall be made under the provisions of Section 6 of the Act of Congress of June 18, 1910, entitled an Act to Create a Commerce Court, etc., and it appearing further that said supplemental petition and the order to show cause based upon said supplemental petition were also duly served by the United States Marshal for the District of Oregon on said Pennsylvania Company by the delivery on December 18, 1916, of duly certified copies of the same to Herbert Rowland personally, clerk in charge of the office of said John S. Campbell, said defendant's District Freight and Passenger Agent in the city of Portland, state and district of Oregon, during the temporary absence of said John S. Campbell out of said state and  
 207 district, no appearance having been entered by said defendant nor any answer or other defense to said supplemental petition filed in the clerk's office although such appearance should have been entered or such answer or other defense to said supplemental petition should have been filed in the clerk's office on or before the 13th day of January, 1917, the same being the time fixed therefor by said order to show cause based upon said supplemental petition, therefore it is

Ordered and decreed that the petition and the supplemental petition be taken as confessed as to said Pennsylvania Company, one of the defendants.

R. S. BEAN,  
*District Judge.*

Dated at Portland, Oregon, January 15, 1917.

Filed January 15, 1917. G. H. Marsh, Clerk.

208 And afterwards, to wit, on the 30th day of January, 1917, there was duly filed in said Court, a Motion of the United States of America to dismiss the Supplemental Petition, in words and figures as follows, to wit:

209 *Motion of the United States to Dismiss the Petition.*

In the United States District Court, District of Oregon.

In Equity.

No. 7229.

SKINNER & EDDY CORPORATION, Petitioner,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION,  
 THE BALTIMORE & OHIO RAILROAD COMPANY, et al., Defendants.

United States of America, defendant, by its counsel, now comes, not waiving its objections to the jurisdiction heretofore filed herein,

but insisting upon the same now and at all times hereafter, and moves the court to dismiss the petition and the supplemental petition at the cost of the petitioner, and as grounds therefor it shows:

1. The petitioner is not a proper party to maintain the said suit, and it has no standing in a court of equity in a suit to suspend or set aside, in whole or in part, the orders of the Interstate Commerce Commission, or either of them.

2. The petition and supplemental petition are without equity on the face thereof and do not state any cause of action against the defendant, and the court may not grant the relief prayed or any part of the same.

BLACKBURN ESTERLINE,  
*Special Assistant to the Attorney General.*  
CLARENCE L. REAMES,  
*United States Attorney.*  
JOHN J. BECKMAN,  
*Assistant United States Attorney.*

Filed January 30, 1917. G. H. Marsh, Clerk.

210 And afterwards, to wit, on Monday, the 26th day of February, 1917, the same being the 95th judicial day of the Regular November, 1916, term of said court; present the Honorable William B. Gilbert, United States Circuit Judge, and the Honorable Charles E. Wolverton and the Honorable Robert S. Bean, District Judges, the following proceedings were had in said cause, to-wit:

211 *Decree of Dismissal.*

In the District Court of the United States for the District of Oregon.

In Equity.

No. 7229.

SKINNER AND EDDY CORPORATION, Petitioner,

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, The Baltimore and Ohio Railroad Company, Bessemer and Lake Erie Railroad Company, Chicago, Burlington and Quincy Railroad Company, Chicago and Northwestern Railway Company, Chicago, Milwaukee and St. Paul Railway Company, The Great Northern Railway Company, Illinois Central Railroad Company, The New York Central Railroad Company, The New York, Chicago and St. Louis Railroad Company, Northern Pacific Railway Company, Oregon Short Line Railroad Company, Oregon-Washington Railroad and Navigation Company, Pennsylvania Company, The Pittsburgh and Lake Erie Railroad Company, The Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company, and Union Pacific Railway Company, Defendants.

This cause came on duly to be heard before William B. Gilbert, Circuit Judge, and Charles E. Wolverton and Robert S. Bean, Dis-

trict Judges, and it appearing to the Court that all of the defendants save and except Bessemer and Lake Erie Railroad Company, The Baltimore and Ohio Railroad Company, Pennsylvania Company and The Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company have filed motions herein to dismiss the Petition and the Supplemental Petition herein, upon the ground that said Petition  
212 and Supplemental Petition do not state a cause of action in equity against the said several defendants and said motions having been duly submitted to the Court, and the Court being advised,

It is now ordered, adjudged and decreed that the Petition and Supplemental Petition herein do not state any cause of action against said defendants or any of them, and this cause be and the same is hereby dismissed and that the defendants and each of them, save and except the defendants Bessemer and Lake Erie Railroad Company, The Baltimore and Ohio Railroad Company, Pennsylvania Company and The Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company, do have and recover against the petitioner their costs and disbursements to be taxed at the foot hereof.

Feb. 26, 1917.

By the Court:

WM. B. GILBERT,  
*Circuit Judge.*  
CHAS. E. WOLVERTON,  
R. S. BEAN,  
*District Judges.*

Filed February 28, 1917. G. H. Marsh, Clerk.

213 And afterwards, to wit, on the 30th day of March, 1917, there was duly Filed in said Court, an Assignment of Errors, in words and figures as follows, to wit:

214 *Assignment of Errors.*

In the United States District Court for the District of Oregon.

In Equity.

No. 7229.

SKINNER AND EDDY CORPORATION, Petitioner,

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, The Baltimore and Ohio Railroad Company, and Fifteen Other Railroad Companies, Defendants.

Comes now the petitioner, Skinner and Eddy Corporation, and by its solicitors, and in connection with its petition for appeal files the following assignment of errors on which it will rely upon said

appeal to the Supreme Court of the United States from the final order or decree of the District Court, entered February 26, 1917, in the above entitled cause.

The District Court erred:

### I.

In denying by its order of December 29, 1916, the application of the petitioner for a temporary or interlocutory order suspending orders of the Interstate Commerce Commission mentioned in the prayer of the petition herein and restraining the defendant railroad companies from enforcing or collecting rates on iron and steel articles from Pittsburgh and other eastern defined territory to Pacific Coast terminals, under Supplement 18 to Transcontinental Tariff No. 4-M, I. C. C. No. 1020, described in the petition herein.

### II.

In holding that said orders of the Interstate Commerce Commission were within its jurisdiction and authority.

215

### III.

In holding that the tariffs so sought to be enjoined have been filed according to law and in pursuance of the authority of said orders of the Interstate Commerce Commission, and with the consent of said Commission.

### IV.

In ordering, adjudging, and decreeing that "the Petition and Supplemental Petition herein do not state any cause of action against said defendants or any of them."

### V.

In ordering, adjudging, and decreeing that "this cause be and the same is hereby dismissed."

### VI.

In adjudging, ordering, and decreeing that "the defendants and each of them, save and except the defendants Bessemer and Lake Erie Railroad Company, The Baltimore and Ohio Railroad Company, Pennsylvania Company, and the Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company, do have and recover against the petitioner their costs and disbursements to be taxed."

### VII.

In entering, on February 26, 1917, the following decree:  
That the Petition and Supplemental Petition herein do not state



any cause of action against said defendants or any of them, and this cause be and the same is hereby dismissed and that the defendants and each of them, save and except the defendants Bessemer and Lake Erie Railroad Company, The Baltimore and Ohio Railroad Company, Pennsylvania Company, and the Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company, do have and recover against the petitioner their costs and disbursements to be taxed at the foot hereof.

## VIII.

In not granting the prayer of the petitioner for a final and perpetual injunction against the defendants in the respects specified and on the grounds set forth in the petition and in the supplemental petition.

## IX.

In not adjudging that the petition and the supplemental petition state a good cause of action or suit against the defendants.

## X.

In not denying the motions of the defendants to dismiss the petition and the supplemental petition.

## XI.

In not adjudging that the petitioner by its petition and amended petition showed itself entitled to the relief prayed for therein as against the motions to dismiss filed by the defendants.

## XII.

In entering a final order or decree in this cause against the petitioner and in favor of the defendants.

## XIII.

In not granting petitioner the relief prayed for by it in the petition and the supplemental petition.

Wherefore, the petitioner prays that said final order or decree of the District Court, entered February 26, 1917, be reversed, annulled, and set aside and that the District Court be instructed to enter such decree as is prayed for by the petition and the supplemental  
217 petition, and that such other and further order be made as may be appropriate.

JOSEPH N. TEAL,  
WILLIAM C. McCULLOCH,  
*Solicitors for Petitioner.*

Filed, March 30, 1917. G. H. Marsh, Clerk.

218 And afterwards, to wit, on the 30th day of March, 1917, there was duly Filed in said Court, a Petition for Appeal, in words and figures as follows, to wit:

219 *Petition for Appeal.*

In the United States District Court for the District of Oregon.

In Equity.

No. 7229.

SKINNER AND EDDY CORPORATION, Petitioner,

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, The Baltimore and Ohio Railroad Company, Bessemer and Lake Erie Railroad Company, Chicago, Burlington and Quincy Railroad Company, Chicago and Northwestern Railway Company, Chicago, Milwaukee and St. Paul Railway Company, The Great Northern Railway Company, Illinois Central Railroad Company, The New York Central Railroad Company, The New York, Chicago and St. Louis Railroad Company, Northern Pacific Railway Company, Oregon Short Line Railroad Company, Oregon-Washington Railroad and Navigation Company, Pennsylvania Company, The Pittsburgh and Lake Erie Railroad Company, the Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company, and Union Pacific Railroad Company, Defendants.

Skinner and Eddy Corporation, the above named petitioner, feeling itself aggrieved by the final order or decree of the District Court, entered February 26, 1917, adjudging that the petition and the supplemental petition do not state any cause of action against the defendants or any of them and dismissing this cause and allowing costs against the petitioner to all the defendants except Bessemer and Lake Erie Railroad Company, The Baltimore and Ohio Railroad Company, Pennsylvania Company, and The Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company, by its counsel prays an appeal to the Supreme Court of the United States from said final order and decree.

220 The particulars wherein the petitioner considers said final order or decree erroneous are set forth in the assignment of errors now on file, to which reference is made.

And the petitioner further prays that a transcript of the record, proceedings and papers on which said final order or decree was made and entered, duly authenticated, may be transmitted forthwith to the Supreme Court of the United States.

And the petitioner further prays that citation issue as provided by law and that the proper order touching the security to be required of it to perfect its appeal be made.

And desiring to supersede the execution of said final order or decree the petitioner here tenders bond in such amount as the court may require for such purpose and prays that with the allowance of the appeal a supersedeas be issued.

JOSEPH N. TEAL,

WILLIAM C. McCULLOCH,

*Solicitors for Petitioner.*

Filed March 30, 1917. G. H. Marsh, Clerk.

221 And afterwards, to wit, on Friday, the 30th day of March, 1917, the same being the 23rd judicial day of the Regular March, 1916, term of said Court; present the Honorable William B. Gilbert, United States Circuit Judge, and the Honorable Charles E. Wolverton and the Honorable Robert S. Bean, District Judges, the following proceedings were had in said cause, to-wit:

222

*Order Allowing Appeal.*

In the United States District Court for the District of Oregon.

In Equity.

No. 7229.

SKINNER AND EDDY CORPORATION, Petitioner,

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, The Baltimore and Ohio Railroad Company, and Fifteen Other Railroad Companies, Defendants.

In the above entitled cause the petitioner having made and filed its petition praying an appeal to the Supreme Court of the United States from the final order or decree of the District Court entered February 26, 1917, and also having made and filed an assignment of errors and having conformed in all respects to the statutes and rules of court in such case made and provided,

It is ordered and decreed that the appeal be and the same is hereby allowed as prayed and made returnable on the 28th day of April, 1917; that the appeal shall operate as a supersedeas upon the petitioner filing a bond in the sum of one thousand dollars, with sufficient sureties, to be conditioned as required by law; and that the clerk is directed to transmit forthwith a properly authenticated

transcript of the record, papers, and proceedings to the Supreme Court of the United States.

WM. B. GILBERT,  
*United States Circuit Judge for the District of  
Oregon and Presiding Judge of the District  
Court in the Above-entitled Cause.*

CHAS. E. WOLVERTON,  
*United States District Judge, District of Oregon.*

R. S. BEAN,  
*United States District Judge, District of Oregon.*

Filed March 30, 1917. G. H. Marsh, Clerk.

223 And afterwards, to wit, on the 2nd day of April, 1917,  
there was duly filed in said Court, a Bond on Appeal, in  
words and figures as follows, to wit:

224 *Bond on Appeal.*

In the United States District Court for the District of Oregon.

In Equity.

No. 7229.

SKINNER AND EDDY CORPORATION, Petitioner,

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, The Baltimore and Ohio Railroad Company, Bessemer and Lake Erie Railroad Company, Chicago, Burlington and Quincy Railroad Company, Chicago and Northwestern Railway Company, Chicago, Milwaukee and St. Paul Railway Company, The Great Northern Railway Company, Illinois Central Railroad Company, The New York Central Railroad Company, The New York, Chicago and St. Louis Railroad Company, Northern Pacific Railway Company, Oregon Short Line Railroad Company, Oregon-Washington Railroad and Navigation Company, Pennsylvania Company, The Pittsburgh and Lake Erie Railroad Company, The Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company, and Union Pacific Railroad Company, Defendants.

Know all men by these presents, That we Skinner and Eddy Corporation, as principal, and The American Surety Company of New York, as surety, are held and firmly bound unto the above named

225 The United States of America, Interstate Commerce Commission, The Baltimore and Ohio Railroad Company, Bessemer and Lake Erie Railroad Company, Chicago, Burlington and Quincy Railroad Company, Chicago and Northwestern Railway Company, Chicago, Milwaukee and St. Paul Railway Company, The

Great Northern Railway Company, Illinois Central Railroad Company, The New York Central Railroad Company, The New York, Chicago and St. Louis Railroad Company, Northern Pacific Railway Company, Oregon Short Line Railroad Company, Oregon-Washington Railroad and Navigation Company, Pennsylvania Company, The Pittsburgh and Lake Erie Railroad Company, The Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company, and Union Pacific Railroad Company in the sum of One Thousand Dollars to be paid to the said The United States of America, Interstate Commerce Commission, The Baltimore and Ohio Railroad Company, Bessemer and Lake Erie Railroad Company, Chicago, Burlington and Quincy Railroad Company, Chicago and Northwestern Railway Company, Chicago, Milwaukee and St. Paul Railway Company, The Great Northern Railway Company, Illinois Central Railroad Company, The New York Central Railroad Company, The New York, Chicago, and St. Louis Railroad Company, Northern Pacific Railway Company, Oregon Short Line Railroad Company, Oregon-Washington Railroad and Navigation Company, Pennsylvania Company, The Pittsburgh and Lake Erie Railroad Company, The Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company, and Union Pacific Railroad Company, for the payment of which well and truly to be made we bind ourselves and each of us, our and each of our successors and assigns, jointly and severally firmly by these presents. Sealed with our seals and dated the 31st day of March, 1917. Whereas the above named Skinner and Eddy Corporation has prosecuted an appeal to the Supreme Court of the

United States to reverse the final order or decree rendered in 226 the above entitled suit and entered on February 26, 1917:

Now, therefore, the condition of this obligation is such that if the above named Skinner and Eddy Corporation shall prosecute said appeal to effect and answer all damages and costs, if it fail to make said appeal good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

[SEAL.] SKINNER AND EDDY CORPORATION,

By D. E. SKINNER, *President*.

Attest:

L. B. STEDMAN, *Secretary*.

AMERICAN SURETY COMPANY OF  
NEW YORK,

By LIVINGSTON B. STEDMAN, [SEAL.]

*Resident Vice-president*.

A. E. KRULL, *Resident Assistant Secretary*.

Signed, sealed, and delivered in the presence of us as witnesses:

As to Skinner and Eddy Corporation,

VICTOR H. ELFENDAHL,

JOE N. EDDY.

As to American Surety Company of New York,

VICTOR H. ELFENDAHL,

JOE N. EDDY.

The foregoing bond is hereby approved this 2nd day of April, 1917.

WM. B. GILBERT,  
*United States Circuit Judge for the District of  
Oregon, and Presiding Judge of the District  
Court in the Above-entitled Cause.*

CHAS. E. WOLVERTON,  
*United States District Judge, District of Oregon.*

R. S. BEAN,  
*United States District Judge, District of Oregon.*

Filed, April 2, 1917. G. H. Marsh, Clerk.

227 And afterwards, to wit, on the 18th day of April, 1917 there was duly filed in said Court, a Citation on Appeal, which with the acceptances of service endorsed thereon and the acceptances of service filed on April 28, 1917, is in words and figures as follows, to wit:

228 *Citation on Appeal.*

In the United States District Court for the District of Oregon.

In Equity.

No. 7229.

SKINNER AND EDDY CORPORATION, Petitioner,

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, The Baltimore and Ohio Railroad Company, Bessemer and Lake Erie Railroad Company, Chicago, Burlington and Quincy Railroad Company, Chicago and Northwestern Railway Company, Chicago, Milwaukee and St. Paul Railway Company, The Great Northern Railway Company, Illinois Central Railroad Company, The New York Central Railroad Company, The New York, Chicago and St. Louis Railroad Company, Northern Pacific Railway Company, Oregon Short Line Railroad Company, Oregon-Washington Railroad and Navigation Company, Pennsylvania Company, The Pittsburgh and Lake Erie Railroad Company, The Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company, and Union Pacific Railroad Company, Defendants.

UNITED STATES OF AMERICA, ss:

The President of the United States to The United States of America, Interstate Commerce Commission, The Baltimore and Ohio Railroad Company, Bessemer and Lake Erie Railroad Company,

Chicago, Burlington and Quincy Railroad Company, Chicago and Northwestern Railway Company, Chicago, Milwaukee and St. Paul Railway Company, The Great Northern Railway Company, Illinois Central Railroad Company, The New York Central Railroad Company, The New York, Chicago and St. Louis Railroad Company, Northern Pacific Railway Company, Oregon Short Line Railroad Company, Oregon-Washington Railroad and Navigation Company, Pennsylvania Company, The Pittsburgh and Lake Erie Railroad Company, The Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company, and Union Pacific Railroad Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington within thirty days from the date hereof pursuant to an appeal duly allowed and filed in the Clerk's office of the United States District Court for the District of Oregon wherein Skinner and Eddy corporation is appellant and you are appellees, to show cause, if any there be, why the final order or decree rendered against said appellant in said appeal should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable William B. Gilbert, United States Circuit Judge, District of Oregon; the Honorable Charles E. Wolverton, United States District Judge, District of Oregon; and the Honorable Robert S. Bean, United States District Judge, District of Oregon, this 2d day of April, 1917.

WM. B. GILBERT,  
*United States Circuit Judge.*

CHAS. E. WOLVERTON,  
*United States District Judge.*

R. S. BEAN,  
*United States District Judge.*



230 Service of the within citation on appeal and receipt of a copy is hereby admitted this 3d day of April 1917.

JAMES B. KERR,

*One of Solicitors for The New York Central Railroad Company, The Pittsburgh and Lake Erie Railroad Company, The New York, Chicago and St. Louis Railroad Company, The Great Northern Railway Company, and Northern Pacific Railway Company.*

A. C. SPENCER,

(BERG,)

*One of Solicitors for Chicago and Northwestern Railway Company, Chicago, Burlington and Quincy Railroad Company, Illinois Central Railroad Company, Union Pacific Railroad Company, Oregon Short Line Railroad Company, and Oregon-Washington Railroad and Navigation Company.*

A. C. SPENCER,

(BERG,)

*Solicitor for Chicago, Milwaukee & St. Paul Railway Company.*

JOHN J. BECKMAN,

*Assistant U. S. Attorney, One of Solicitors for The United States of America and Interstate Commerce Commission.*

GEORGE M. BROWN,

*Attorney General of the State of Oregon.*

Filed, April 18, 1917. G. H. Marsh, Clerk.

Copies of the foregoing Citation with acceptance of service thereof filed as follows:

Service of the above citation accepted this 24th day of April, 1917, for Pennsylvania Company.

C. B. HEISERMAN,

*General Counsel.*

Filed April 28, 1917. G. H. Marsh, Clerk,

Service of the above citation accepted this 24th day of April, 1917, for the Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company.

C. B. HEISERMAN,

*General Counsel.*

Filed April 28, 1917. G. H. Marsh, Clerk.

231 Service of the above citation accepted this 24th day of April, 1917, for the Bessemer and Lake Erie Railroad Company.

REED, SMITH, SHAW & BEAL,  
*Atty's for Bessemer & Lake Erie R. R. Co.*

Filed April 28, 1917. G. H. Marsh, Clerk.

232 And afterwards, to wit, on the 18th day of April, 1917, there was duly Filed in said Court, an Affidavit of Thaddeus W. Veness of service of Citation on Appeal, in words and figures as follows, to wit:

233 *Affidavit of Service of Citation on Appeal.*

In the United States District Court for the District of Oregon.

In Equity.

No. 7229.

SKINNER AND EDDY CORPORATION, Petitioner,

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, The Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company, Pennsylvania Company, and Fourteen Other Railroad Companies, Defendants.

STATE OF OREGON,

*County of Multnomah, ss:*

I, Thaddeus W. Veness, being first duly sworn, on my oath depose and say: I am a citizen of the state of Oregon, am over the age of 21 years and belong to the white or caucasian race; I personally served the citation on appeal in the above entitled suit upon said Pennsylvania Company by delivering on April 12, 1917, to John S. Campbell in person, district freight and passenger agent of said Pennsylvania Company in the city of Portland, state of Oregon, a copy of said citation on appeal which copy was duly certified by William C. McCulloch, one of the petitioner's solicitors, to be a true copy of the original citation on appeal; I personally served the citation on appeal in the above entitled suit upon said The Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company in the city of Portland, state of Oregon by delivering on April 12, 1917, to John S. Campbell in person, district freight and passenger agent  
234 of said The Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company in the said city and state, a copy of said citation on appeal which copy was duly certified by William C. McCul-

loch, one of the petitioner's solicitors, to be a true copy of the original citation on appeal.

THADDEUS W. VENESS.

Subscribed and sworn to before me this 12th day of April, 1917.

[SEAL.]

L. G. ROBERTS,

*Notary Public for Oregon.*

My commission will expire January 11, 1921.

Filed, April 18, 1917. G. H. Marsh, Clerk.

235 And afterwards, to wit, on the 25th day of April, 1917, there was duly filed in said Court, an Affidavit of Henry W. Schultheis of service of Citation on Appeal, in words and figures as follows, to wit:

236 *Affidavit of Service of Citation on Appeal.*

In the United States District Court for the District of Oregon.

In Equity.

No. 7229.

SKINNER AND EDDY CORPORATION, Petitioner,

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, The Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company, Pennsylvania Company, The Baltimore & Ohio Railroad Company, The Bessemer & Lake Erie Railroad Company, and Twelve Other Railroad Companies, Defendants.

STATE OF MARYLAND,

*City of Baltimore, ss:*

I, Henry W. Schuitheis, being first duly sworn, on oath depose and say: I am a citizen of the state of Maryland, am over the age of 21 years and belong to the white or Caucasian race; I personally served the citation on appeal in the above entitled suit upon said The Baltimore and Ohio Railroad Company by delivering on April 19, 1917, to George M. Shriver in person, Vice President of said Baltimore & Ohio Railroad Company, in the city of Baltimore, state of Maryland, a copy of said citation on appeal, which copy was duly

certified by William C. McCulloch, one of the petitioner's solicitors, to be a true copy of the original citation on appeal.

HENRY W. SCHULTHEIS.

Subscribed and sworn to before me this 19th day of April, 1917.  
[SEAL.]

JOHN HENRY SKEEN,  
*Notary Public for the State of Maryland.*

My commission expires May, 1918.

Filed, April 25, 1917. G. H. Marsh, Clerk.

237 And afterwards, to wit, on the 25th day of April, 1917, there was duly filed in said Court, an Affidavit of Stanley D. Willis, of service of Citation on Appeal, in words and figures as follows, to wit:

238 *Affidavit of Service of Citation on Appeal.*

In the United States District Court for the District of Oregon.

In Equity.

No. 7229.

SKINNER AND EDDY CORPORATION, Petitioner,

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, The Baltimore and Ohio Railroad Company, Bessemer & Lake Erie Railroad Company, Pennsylvania Company, The Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company, and Twelve Other Railroad Companies, Defendants.

DISTRICT OF COLUMBIA, ss:

I, Stanley D. Willis, being first duly sworn, deposes and says: I am a citizen of the United States of America and a member of the Bar of the District of Columbia; I am over the age of twenty-one years and I belong to the white or Caucasian race; I personally served the citation on appeal in the above entitled suit upon said Pennsylvania Company by delivering on the 18th day of April, 1917, to F. D. McKenney, in person at his office in the city of Washington, District of Columbia, a copy of said citation on appeal, which copy was duly certified by William C. McCulloch, one of the petitioner's solicitors, to be a full, true, and exact copy of the original citation on appeal, said F. D. McKenney being the agent designated by said Pennsylvania Company to the Interstate Commerce Commission as the person upon whom service of all notices and processes may be made under the provisions of Section 6, of the Act of Congress of June 18, 1910, entitled An Act to Create a Com-

merce Court, etc.; I personally served the citation on appeal in the above entitled suit upon said Bessemer and Lake Erie Railroad Company by delivering on the 18th day of April, 1917, to W. N. Akers in person at his office in the city of Washington, District of Columbia, a copy of said citation on appeal, which copy was duly certified by William C. McCulloch, one of the petitioner's solicitors, to be a full, true and exact copy of the original citation on appeal, said W. N. Akers being the agent designated by said Bessemer and Lake Erie Railroad Company to the Interstate Commerce Commission as the person upon whom service of all notices and processes may be made under the provisions of Section 6, of the Act of Congress of June 18, 1910, entitled An Act to Create a Commerce Court, etc.; I personally served the citation on appeal in the above entitled suit upon said The Baltimore and Ohio Railroad Company, by delivering on the 18th day of April, 1917, to G. E. Hamilton in person at his office in the city of Washington, District of Columbia, a copy of said citation on appeal, which copy was duly certified by William C. McCulloch, one of the petitioner's solicitors, to be a full, true and exact copy of the original citation on appeal, said G. E. Hamilton being the agent designated by said The Baltimore & Ohio Railroad Company to the Interstate Commerce Commission as the person upon whom service of all notices and processes may be made under the provisions of Section 6 of the Act of Congress, of June 18, 1910, entitled An Act to Create a Commerce Court, etc.; and I personally served the citation on appeal in the above entitled suit upon said The Pittsburgh, Cincinnati, Chicago & St. Louis Railroad Company by delivering on the 18th day of April, 1917, to F. D. McKenney in person at his office in the city of Washington, District of Columbia, a copy of said citation on appeal, which copy was duly certified by William C. McCulloch, one of the petitioner's solicitors, to be a full, true, and exact copy of the original citation on appeal, said F. D. McKenney being the agent designated by said The Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company to the Interstate Commerce Commission as the person upon whom service of all notices and processes may be made under the provisions of section 6 of the Act of Congress of June 18, 1910, entitled An Act to Create a Commerce Court, etc.

STANLEY D. WILLIS.

Subscribed and sworn to before me this 19th day of April, 1917.

[SEAL.]

JAMES H. COSTELO,

*Notary Public.*

Filed, April 25, 1917. G. H. Marsh, Clerk.

241 And afterwards, to wit, on the 28th day of April, 1917, there was duly filed in said Court, an Affidavit of C. W. Parker of service of Citation on Appeal, in words and figures as follows, to wit:

*Affidavit of Service of Citation on Appeal.*

In the United States District Court for the District of Oregon.

In Equity.

No. 7229.

SKINNER AND EDDY CORPORATION, Plaintiff,

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, The Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company, Pennsylvania Company, The Baltimore & Ohio Railroad Company, The Bessemer & Lake Erie Railroad Company, and Twelve Other Railroad Companies, Defendants.

STATE OF PENNSYLVANIA,

*County of Allegheny, ss:*

I, C. W. Parker, being first duly sworn on oath depose and say, That I am a citizen of the state of Pennsylvania, and over the age of 21 years and belong to the white or Caucasian race; I personally served the citation on appeal in the above entitled suit upon the Pennsylvania Company, one of the defendants in the above entitled cause, by delivering, on April 24, 1917, to C. B. Heiserman, in person, General Counsel of said Pennsylvania Company, in the city of Pittsburgh, a copy of said citation on appeal which copy was duly certified by William C. McCulloch, one of the petitioner's solicitors, to be a true copy of the original citation on appeal; I personally served the citation on appeal in the above entitled suit upon the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company, by delivering, on April 24, 1917, to C. B. Heiserman, in person, General Counsel of said The Pittsburgh, Cincinnati, Chicago & St.

Louis Railway Company, in the city of Pittsburgh state of  
243 Pennsylvania, a copy of said citation on appeal, which copy was duly certified by William C. McCulloch, one of the petitioner's solicitors, to be a true copy of the original citation on appeal; and I personally served the citation on appeal in the above entitled suit upon said Bessemer & Lake Erie Railroad Company, by delivering, on April 24, 1917, to Reed, Smith, Shaw & Beal, in person, General Counsel of said Bessemer & Lake Erie Railroad Company, in said city of Pittsburgh, state of Pennsylvania, a copy of said citation on appeal, which copy was duly certified by William C. McCulloch, one of the petitioner's solicitors, to be a true copy of the original citation on appeal.

C. W. PARKER.

Subscribed and sworn to before me this 24th day of April, 1917.

[SEAL.]

ALBERT C. ROHLAND,  
*Notary Public.*

My commission will expire January 21, 1919.

Filed, April 28, 1917. G. H. Marsh, Clerk.

244 And afterwards, to wit, on Thursday, the 19th day of April, 1917, the same being the 40th judicial day of the Regular March, 1917, term of said Court; present the Honorable William B. Gilbert, United States Circuit Judge, and the Honorable Charles E. Wolverton and the Honorable Robert S. Bean, District Judges, the following proceedings were had in said cause, to-wit:

245 *Order Enlarging Time for Docketing Case and Filing Transcript of Record on Appeal.*

In the United States District Court for the District of Oregon.

In Equity.

No. 7229.

SKINNER AND EDDY CORPORATION, Petitioner,

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, The Baltimore and Ohio Railroad Company, and Fifteen Other Railroad Companies, Defendants.

This cause came on to be heard on the oral motion of the petitioner appearing by William C. McCulloch, one of its solicitors, for an order enlarging the time for docketing the case and filing the record thereof with the clerk of the Supreme Court of the United States, and it appearing that the petitioner, Skinner and Eddy Corporation, has appealed to the Supreme Court of the United States from the final order or decree of this court entered on February 26, 1917, which appeal was made returnable on April 28, 1917, and it appearing further that said petitioner has duly filed its assignments of error and bond on appeal and has procured a citation on appeal to be issued and to be served on the defendants in the above entitled cause, and it appearing further that said petitioner (being the appellant in the Supreme Court) cannot docket the case and file the record thereof with the clerk of the Supreme Court of the United States by April 28, 1917, for lack of sufficient time and that such inability of said petitioner and appellant to docket the case and file the record thereof as aforesaid is not and has not been due to any neglect or failure by it to exercise reasonable diligence in that behalf, and it appearing that additional time beyond



246 April 28, 1917, is required to enable the clerk of this court to prepare the transcript of the record on appeal and to transmit the same to the clerk of the Supreme Court, and good cause being shown therefor:

It is considered and ordered therefore that the time for docketing said case and filing the record thereof with the clerk of the Supreme Court of the United States by said petitioner, Skinner and Eddy Corporation (being the appellant in the Supreme Court) be and the same is enlarged hereby for the period of 60 days from and after April 28, 1917; and

It is considered and ordered further that said petitioner, Skinner and Eddy Corporation (being the appellant in the Supreme Court) file forthwith this order with the clerk of the Supreme Court of the United States and a copy thereof with the clerk of this court.

Done at Portland, Oregon, April 19, 1917.

WM. B. GILBERT,

*United States Circuit Judge for the District of  
Oregon, and Presiding Judge of the District  
Court in the Above-entitled Cause.*

CHAS. E. WOLVERTON,

*United States District Judge, District of Oregon.*

R. S. BEAN,

*United States District Judge, District of Oregon.*

I, William C. McCulloch, hereby certify that I am one of the solicitors for the petitioner in the above-entitled suit and that I have compared the within copy of the order enlarging time for docketing case and filing transcript of record on appeal with the original and that the within copy is a full, true, and exact copy of such original and of the whole thereof. Dated at Portland, Oregon, April 19, 1917.

WILLIAM C. McCULLOCH.

Filed, April 19, 1917. G. H. Marsh, Clerk.

247 And afterwards, to wit, on the 30th day of April, 1917, there was duly filed in said Court, a Praecipe for Transcript of Record on Appeal, in words and figures as follows, to wit:

248 *Præcipe for Transcript of Record on Appeal.*

In the United States District Court for the District of Oregon.

In Equity.

No. 7229.

SKINNER AND EDDY CORPORATION, Petitioner,

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, The Baltimore and Ohio Railroad Company, and Fifteen Other Railroad Companies, Defendants.

To G. H. Marsh, Esq., Clerk of the United States District Court, District of Oregon:

You will please prepare and certify a transcript of the entire record of the proceedings in the above entitled cause, to be filed in the office of the clerk of the Supreme Court of the United States, on the appeal from the final order or decree of the district court, entered February 26, 1917, and include in the said transcript, in the order given below, the following pleadings, proceedings, papers and orders, on file or of record, and the indorsements thereon showing acceptances of service, dates of filing, et cetera, to wit:

1. Petition with the returns of service thereof on The Baltimore and Ohio Railroad Company, Bessemer and Lake Erie Railroad Company, Pennsylvania Company, and The Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company.

2. Original subpoenas to defendants The Baltimore and Ohio Railroad Company, Bessemer and Lake Erie Railroad Company, Pennsylvania Company, and The Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company with the returns of service thereof on such four defendants only.

3. Answer of The United States of America.

4. Order of August 21, 1916, to show cause.

5. Order of August 31, 1916, permitting petitioner to withdraw without prejudice its application for a temporary restraining order.

6. Motion of The New York Central Railroad Company and The Pittsburgh and Lake Erie Railroad Company to dismiss the bill of complaint.

7. Motion of The Great Northern Railway Company and Northern Pacific Railway Company to dismiss the bill of complaint.

8. Motion of The New York, Chicago and St. Louis Railroad Company to dismiss the bill of complaint.

9. Motion of Union Pacific Railroad Company, Oregon Short Line Railroad Company, and Oregon-Washington Railroad and Navigation Company to dismiss the bill of complaint and petition of the petitioner.

10. Motion of Illinois Central Railroad Company, Chicago, Burlington and Quincy Railroad Company, and Chicago and Northwestern Railway Company to dismiss the bill of complaint and petition of the petitioner.

11. Motion of Chicago, Milwaukee and St. Paul Railway Company to dismiss the bill of complaint and petition of the petitioner.

12. Motion of Interstate Commerce Commission to dismiss the petition and answer by Interstate Commerce Commission.

250 13. Order of December 13, 1916, permitting petitioner to file supplemental petition or bill of complaint.

14. Supplemental petition.

15. Order of December 16, 1916, to show cause.

16. Returns of service of supplemental petition and of order to show cause of December 16, 1916, upon The Baltimore and Ohio Railroad Company, Bessemer and Lake Erie Railroad Company, Pennsylvania Company, and The Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company.

17. Order of December 29, 1916, denying petitioner's application for a temporary injunction or interlocutory restraining order, also order of same date allowing the United States and Interstate Commerce Commission until February 1, 1917, to move, plead, or answer.

18. Motion of The Great Northern Railway Company and Northern Pacific Railway Company to dismiss the supplemental petition.

19. Motion of The New York, Chicago and St. Louis Railroad Company to dismiss the supplemental petition.

20. Motion of The New York Central Railroad Company and The Pittsburgh and Lake Erie Railroad Company to dismiss the supplemental petition.

21. Motion of Chicago and Northwestern Railway Company, Chicago, Burlington and Quincy Railroad Company, Illinois Central Railroad Company, Union Pacific Railroad Company, Oregon Short Line Railroad Company, Oregon-Washington Railroad and Navigation Company, and Chicago, Milwaukee and St. Paul Railway Company to dismiss the original petition and the supplemental petition.

22. Motion of the Interstate Commerce Commission to dismiss the petition as amended.

251 23. Decree of January 15, 1917, taking petition and supplemental petition as confessed as to The Baltimore and Ohio Railroad Company.

24. Decree of January 15, 1917, taking petition and supplemental petition as confessed as to Bessemer and Lake Erie Railroad Company.

25. Decree of January 15, 1917, taking petition and supplemental petition as confessed as to The Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company.

26. Decree of January 15, 1917, taking petition and supplemental petition as confessed as to Pennsylvania Company.

27. Motion of United States of America to dismiss the petition and supplemental petition.

28. Final order and decree of February 26, 1917, dismissing the suit.

29. Assignment of errors.

30. Petition for appeal.

31. Order allowing appeal.

32. Bond on appeal.

33. Citation on appeal.

34. Affidavits of service of citation on appeal.

35. Acceptances of service of citation on appeal for Bessemer and Lake Erie Railroad Company, Pennsylvania Company, and The Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company.

36. Copy of order enlarging time for docketing case and filing transcript of record on appeal.

37. This praecipe.

JOSEPH N. TEAL,

WILLIAM C. McCULLOCH,

*Solicitors for Skinner and Eddy Corporation.*

Dated at Portland, Oregon, April 28, 1917.

252 Service of the within praecipe for transcript of record on appeal and receipt of a copy thereof, is hereby admitted this 30th day of April, 1917, at Portland, Oregon, by the undersigned, who do not desire any additional portions of the record incorporated in the transcript, and who therefore respectively waive any further time for the filing of praecipe by them, or either of them, for such purpose, and who hereby agree that the portions of the record hereinbefore specified in the praecipe of Skinner and Eddy Corporation, the petitioner in the District Court and the appellant in the Supreme Court, shall constitute the transcript of record on appeal.

JAMES B. KERR,

*One of the Solicitors for The New York Central Railroad Company, The Pittsburgh and Lake Erie Railroad Company, The New York, Chicago and St. Louis Railroad Company, The Great Northern Railway Company, and Northern Pacific Railway Company.*

A. C. SPENCER,

*One of the Solicitors for Chicago & Northwestern Railway Company, Chicago, Burlington and Quincy Railroad Company, Illinois Central Railroad Company, Union Pacific Railroad Company, Oregon Short Line Railroad Company, Oregon-Washington Railroad and Navigation Company, and Chicago, Milwaukee and St. Paul Railway Company.*

JOHN J. BECKMAN,

*One of the Solicitors for The United States of America and Interstate Commerce Commission.*

Filed, April 30, 1917. G. H. Marsh, Clerk.

253 UNITED STATES OF AMERICA,  
*District of Oregon, ss:*

I, G. H. Marsh, Clerk of the District Court of the United States for the District of Oregon, pursuant to the order allowing appeal in the within entitled cause, do hereby certify that the foregoing pages, numbered from 22 to 252 inclusive, constitute the transcript of record on appeal in the Equity Cause No. 7229 in said Court between Skinner and Eddy Corporation, Petitioner and Appellant, and The United States of America, Interstate Commerce Commission, The Baltimore and Ohio Railroad Company, Bessemer and Lake Erie Railroad Company, Chicago, Burlington and Quincy Railroad Company, Chicago and Northwestern Railway Company, Chicago, Milwaukee and St. Paul Railway Company, The Great Northern Railway Company, Illinois Central Railroad Company, The New York Central Railroad Company, The New York, Chicago and St. Louis Railroad Company, Northern Pacific Railway Company, Oregon Short Line Railroad Company, Oregon-Washington Railroad and Navigation Company, Pennsylvania Company, The Pittsburgh and Lake Erie Railroad Company, The Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company, and Union Pacific Railroad Company, defendants and appellees; that the said transcript of record has been prepared by me in accordance with the rules of Court and the praecipe for transcript filed in said cause by said appellant, and is a full, true, complete and correct transcript and copy of the record and all proceedings had in said Court in said cause designated by the said praecipe to be included therein, as the same appear of record and on file at my office and in my custody.

I return with the said transcript, attached thereto, the original citation in said cause together with the original acceptances and affidavits of service of said citation.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court, at Portland, in said District, this 9th day of June, A. D. 1917.

[Seal United States District Court, Oregon.]

G. H. MARSH,  
*Clerk of the District Court of the United States  
for the District of Oregon.*

Endorsed on cover: File No. 26,013. Oregon D. C. U. S. Term No. 546. Skinner and Eddy Corporation, appellant, vs. The United States of America, Interstate Commerce Commission, The Baltimore & Ohio Railroad Company et al. Filed June 20th, 1917. File No. 26,013.

-2-  
No. 215

FILED  
FEB 24 1919  
JAMES D. WAHER,  
CLERK

# Supreme Court of the United States

October Term, 1918

SKINNER & EDDY CORPORATION,

*Appellant,*

*v.*

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE  
COMMISSION, THE BALTIMORE & OHIO RAILROAD  
COMPANY, AND OTHERS,

*Appellees.*

## BRIEF FOR APPELLANT

JOSEPH N. TEAL,  
WILLIAM C. McCULLOCH,  
Solicitors for Appellant.

TEAL, MINOR & WINFREE,  
Portland, Oregon,

L. B. STEDMAN,  
Seattle, Washington,

W. E. CREED,  
San Francisco, California,  
Of Counsel for Appellant.





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# Supreme Court of the United States

October Term, 1918

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SKINNER & EDDY CORPORATION,

*Appellant,*

*v.*

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE  
COMMISSION, THE BALTIMORE & OHIO RAILROAD  
COMPANY, AND OTHERS,

*Appellees.*

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## BRIEF FOR APPELLANT

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### STATEMENT OF THE CASE

The Skinner & Eddy Corporation, which is the appellant in this court, since February, 1916, has been engaged in the construction of steel ships at Seattle, Washington. Its shipyard is located on the shore of Puget Sound, a navigable arm of the Pacific Ocean. The raw material used in the construction of these ships consists largely of steel plates, shapes, bars and rivet rounds. The principal market in the United States for such steel articles is in and around Pittsburgh, Pennsylvania. The appellant was compelled to buy its raw material in that market in order to obtain it in large quantities for prompt delivery. This material was purchased f.o.b. cars at Pittsburgh, whence it was transported by rail to Seattle. The appellant paid the freight and was not reimbursed.

A rate of 80 cents per 100 pounds on iron and steel articles in carloads from Pittsburgh to Seattle was in effect from March 22, 1910, to April 10, 1916, when it was reduced to 65 cents. On July 28, 1916, a rate of 94 cents was published, which was noted to become effective Sep-

tember 1, 1916, but which never went into effect for reasons hereinafter explained.

Prior to July 28, 1916, the appellant had contracted to purchase in Pittsburgh and adjacent points approximately 25,000 tons of steel, which was required for the construction of certain ships, which it had agreed to build and deliver during the years 1916 and 1917. The seller was not obligated by these contracts to make deliveries prior to September 1, 1916, and the appellant was unable to obtain delivery of any part of such material before that date. The proposed increase of 29 cents per 100 pounds amounted to approximately \$145,000 on 25,000 tons of material, all of which was shipped to the appellant from time to time after September 1, 1916.

The reduction of the rate from 80 to 65 cents was caused by the competition of carriers by water between the Atlantic and Pacific coasts with the transcontinental railroads, whose common practice prior to 1910 because of such competition had been to make freight rates from eastern defined territory to Pacific coast ocean terminals lower than to territory directly intermediate.

The Great Northern Railway Company, the Chicago, Milwaukee & St. Paul Railway Company, and the Northern Pacific Railway Company, three of the railroads that are appellees in this court, have lines that reach Seattle. These railroads all serve Spokane, which is a little more than three hundred miles east of Seattle. Shipments from eastern defined territory to Seattle delivered over the rails of any one of these three carriers must pass through Spokane.

By the act of June 18, 1910, Chapter 309, 36 Stat. L., 539, amending section 4 of the act to regulate commerce, carriers were prohibited from charging more "for a shorter than for a longer distance over the same line or route in the same direction" without obtaining authority from the Interstate Commerce Commission so to do. A period of six months from the passage of the amendment was pro-

vided within which carriers might file application for authority to continue charges of that nature then lawfully existing.

Proceeding under section 4 as amended, the railroad companies, which are appellees in this court, and other transcontinental carriers on December 13, 1910, applied to the Commission for authority to make rates from the Atlantic seaboard and interior points (including Pittsburgh) to Pacific coast terminals (including Seattle) lower than rates concurrently in effect to intermediate points (including Spokane) and stated in their application that lower rates at the more distant points were necessary by reason of competition of various water carriers between the Atlantic and Pacific coasts. After full hearing the Commission on July 31, 1911, made its Fourth Section Order No. 124, and thereby authorized the maintenance by the carriers of higher rates to intermediate points, including Spokane, than to points on the Pacific coast, including Seattle, on traffic originating east of the Missouri river.

On July 9, 1914, the railroad companies, which are appellees in this court, and other transcontinental carriers filed with the Commission a petition asking that they be granted a hearing concerning the rates on certain commodities (including iron and steel articles) shown in the list attached to the application and designated as Schedule C, it being their purpose to show that as to these rates conditions justified a greater degree of relief than was afforded by the original order. In their application the petitioners asserted that the commodities named (including iron and steel articles) originated in large volume on the Atlantic seaboard, that these commodities were adapted to water transportation and in fact moved in considerable quantities from the Atlantic seaboard to the Pacific coast by water, that the rates made by the water carriers on these commodities were extremely low and necessitated correspondingly low rates by the rail carriers

from eastern seaboard territory, that the low rates so imposed from the eastern seaboard to the Pacific coast necessitated correspondingly low rates from Pittsburgh and Chicago territories in order to permit the rail movement of traffic from these points to the Pacific coast in competition with the same or similar commodities moving by water from the Atlantic seaboard, and in order to comply with the requirement of the fourth section, which prohibits carriers from making a greater charge from intermediate points than from more distant points (the more distant points in that instance being located at or near the Atlantic seaboard), and that with the completion of the Panama Canal the water carriers had reduced their rates materially, shortened the time for transportation, increased the frequency of their sailings, and added materially both to their tonnage capacity and to the actual tonnage obtained. The Panama Canal was opened for traffic on August 15, 1914, and its immediate use by ships intensified very greatly the competition by water encountered by the transcontinental railroads operating between the Atlantic and Pacific coasts and compelled these railroads to make substantial reductions in their rates to the coast terminals to prevent further loss of traffic to water carriers. Like reductions to Spokane and other intermediate points were not necessary, because such water competition did not exist there.

After full hearing the Commission on January 29, 1915, made its amended Fourth Section Order No. 124, and on April 30, 1915, further amended the same and authorized therein the petitioning carriers to establish and maintain from eastern defined territory to Seattle and other Pacific coast terminals lower carload rates on iron and steel articles without publishing them to Spokane and other intermediate points concurrently. These carriers thereupon published and put into effect on July 15, 1915, in lieu of the 80 cent rate theretofore in effect on iron and steel articles in carloads from Chicago and com-

mon points to Seattle and other Pacific coast terminals a rate of 55 cents per 100 pounds, and pursuant to the authority granted by the Commission published and maintained concurrently higher rates to intermediate points of destination.

On September 27, 1915, the railroad companies, which are appellees in this court, and other transcontinental carriers applied to the Commission in their Fourth Section Application No. 10336 for authority to establish a rate of 55 cents per 100 pounds on iron and steel articles in carloads from Pittsburgh and common points to Seattle and other Pacific coast terminals without making such rate applicable to directly intermediate points of destination. After full hearing the Commission on March 1, 1916, made a report on this application and an order whereby the petitioning carriers were authorized to establish and maintain from Pittsburgh and common points to Seattle and other Pacific coast terminals a rate of 65 cents per 100 pounds on iron and steel articles in carloads. The petitioning carriers published this rate of 65 cents effective April 10, 1916.

Thereafter in certain proceedings resulting from two petitions filed with the Commission, one by the Railroad Commission of Nevada and the other by the Spokane Merchants' Association, the Commission found in a report promulgated on June 5, 1916, that there probably would be but little effective water service during that year and perhaps for a considerable period thereafter, and on the same date it made an order rescinding, effective September 1, 1916, the relief afforded from the requirements of the fourth section in response to Fourth Section Application No. 10336 respecting rates on iron and steel articles in carloads from Pittsburgh and common points to Seattle and other Pacific coast terminals, but authorizing a readjustment of rates that afforded in a modified degree relief from the requirements of the fourth section. It was in response to this order that the rail-



road companies, that are appellees in this court, and other transcontinental rail carriers published on July 28, 1916, the proposed rates of 94 cents from Pittsburgh to Seattle and to other Pacific coast terminals. The proposed increased rates did not comply with the long and short haul rule of the fourth section, being lower to Seattle, for example, than to Spokane, a point directly intermediate.

No schedules of proposed increased rates on iron and steel articles in carloads from Pittsburgh to Seattle or on any other commodities were before the Commission at the hearing or at any other stage of the proceedings which culminated in its report and order of June 5, 1916, and none could have been as none had been published or filed by the carriers. In its report of June 5, 1916, the Commission found as a fact that water competition with carriers by railroad between the Atlantic seaboard and Pacific coast terminals had been eliminated practically and was substantially non-existent, and upon this finding based its order rescinding the relief granted in response to Fourth Section Application No. 10336.

Section 4 of the act to regulate commerce as amended June 18, 1910, provides:

"Whenever a carrier by railroad shall in competition with a water route or routes reduce the rates on the carriage of any species of freight to or from competitive points, it shall not be permitted to increase such rates unless after hearing by the Interstate Commerce Commission it shall be found that such proposed increase rests upon changed conditions other than the elimination of water competition."

Neither prior to the issuance of its order of June 5, 1916, as amended July 13, 1916, nor at any time subsequent thereto did the Commission hold a hearing to determine whether the proposed increase of the rates on iron and steel articles in carloads from Pittsburgh to Seattle from 65 cents to 94 cents per 100 pounds, noted to become effective on September 1, 1916, rested upon changed conditions

other than the elimination of water competition. The Commission nevertheless by its order of June 5, 1916, as amended July 13, 1916, undertook to authorize the railroad companies that are appellees in this court and other trans-continental railroads to increase their rates on iron and steel articles in carloads from Pittsburgh to Seattle and other Pacific coast terminals without a prior hearing by it to determine whether such proposed increases rested upon changed conditions other than the elimination of water competition.

By section 15 of the act to regulate commerce the Commission is authorized to suspend the operation of a schedule stating a new rate and to defer the use of such rate pending a hearing concerning its propriety. The appellant on August 4, 1916, made a protest in writing to the Commission against the proposed increased rate of 94 cents and requested its suspension pending a hearing. This request for suspension not having been acted upon by the Commission, the appellant on August 21, 1916 filed its petition in the District Court against the appellees for a temporary restraining order. On August 29, 1916, the Commission by order suspended the operation of the proposed increased rates until December 30, 1916.

By virtue of this order the proposed rates of 94 cents did not become effective on September 1, 1916, and on August 31, 1916, the appellant obtained leave of the District Court to withdraw without prejudice its application for a temporary restraining order.

The effective date of the Commission's order of June 5, 1916, as amended July 13, 1916, was September 1, 1916. In other words, that was the last day on which the carriers might comply with the order without incurring penalties for its disobedience. By publishing on July 28, 1916, rates of 94 cents on iron and steel in carloads from Pittsburg to Seattle and Spokane the carriers complied with the order, whose purpose thus was served, so far as those commodities were concerned.

The order in terms did not require the carriers to increase the rate from Pittsburgh to Seattle, but the carriers might have complied with it by a reduction of the rates to Spokane and other directly intermediate points. It was because the carriers chose to comply with the order by a method forbidden by the last paragraph of the fourth section of the act to regulate commerce that the appellant filed its petition in the District Court. The relief asked against the carriers was a restraining order to prevent the collection of the proposed increased rates until the "Commission shall have held a hearing to determine whether the proposed increases rest upon changed conditions other than the elimination of water competition." Because the Commission suggested in its report of June 5, 1916, that it would not be improper for the carriers to comply with its order of that date by increasing the rates to Seattle, the appellant made the Commission and the United States defendants in the suit in the District Court, praying that they be restrained from taking any steps or instituting any proceedings to enforce the orders of June 5, 1916, and of July 13, 1916, "so far as the same permit the transcontinental rail carriers to increase their west-bound rates on iron and steel articles in carloads from Pittsburgh to Pacific coast ports."

Notwithstanding the carriers' compliance with the order of June 5, 1916, as amended July 13, 1916, the Commission on September 19, 1916, made an order and attempted thereby further to amend as of August 31, 1916, its order of June 5, 1916, as amended July 13, 1916, so as to make it become effective December 30, 1916, instead of September 1, 1916.

On October 17, 1916, the Commission made an order re-opening for further hearing certain Fourth Section Applications, including No. 10336, respecting rates on iron and steel articles in carloads from Pittsburgh to Seattle. This action was taken following the filing with it on September 9, 1916, by the Merchants' Association of Spokane

of a petition, which alleged that there was not then and had not been since June 5, 1916, any water competition between the Atlantic and Pacific coasts of the United States and that there was then no justification for the maintenance of lower rates on any commodities from eastern defined territories to Pacific coast ports than to intermediate points.

The Commission on November 13, 1916, made an order and thereby attempted to postpone until its further order its order of June 5, 1916, as amended July 13, 1916, the effective date of which the Commission theretofore had attempted to postpone until December 30, 1916. The Commission did not attempt thereafter and prior to December 30, 1916, to fix and establish a date for its order of June 5, 1916, as amended, to go into effect.

On or about November 14, 1916, the railroad companies that are appellees in this court and other transcontinental carriers cancelled with the Commission's permission the suspended rate of 94 cents on iron and steel in carloads from Pittsburg to Seattle and on November 18, 1916, published and filed with the Commission a rate of 75 cents on iron and steel in carloads from Pittsburgh to Seattle noted to become effective December 30, 1916. This was an increase of 10 cents per 100 pounds over the rate of 65 cents then in effect.

The appellant on December 11, 1916, complained in writing to the Commission against the proposed increase and requested that it be suspended pending a hearing to determine the propriety thereof. At that time the appellant had outstanding contracts to purchase approximately 75,000 tons of steel for delivery after December 30, 1916, on which amount of material the additional transportation cost represented by the proposed increase was \$150,000. The appellant's protest to the Commission was against the attempted increase in violation of the fourth section of a rate reduced to meet water competition (which competition later was eliminated) without a previous hearing and finding by the Commission that the proposed increase rested

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upon changed conditions other than the elimination of such water competition.

This protest not having been acted upon by the Commission, the appellant on December 16, 1916, filed in the District Court its supplemental petition in which it prayed an interlocutory order temporarily restraining and enjoining (a) the Commission from enforcing its order of June 5, 1916, as amended July 13, 1916, so far as it undertook or attempted or purported to permit the transcontinental rail carriers to increase their west-bound rates on iron and steel articles in carloads from Pittsburgh to Pacific coast ports, and (b) the railroad companies that are appellees in this court from collecting or exacting on and after December 30, 1916, the proposed rate of 75 cents or any rates in excess of 65 cents until the Commission should have held a hearing to determine whether the proposed increases rested upon changed conditions other than the elimination of water competition. A permanent injunction after final hearing was also sought and a decree setting aside and annulling the order of the Commission of June 5, 1916, as amended July 13, 1916, so far as it permitted or attempted or purported to permit the transcontinental carriers to increase their rates on iron and steel articles west-bound from Pittsburgh to Pacific coast ports and perpetually enjoining the railroad companies from charging, collecting or exacting from the appellant the proposed increased rate of 75 cents.

The District Court made an order requiring the defendants to show cause why the relief prayed for should not be granted and on December 29, 1916, arguments were made upon the application for a temporary restraining order, which application was denied. On February 26, 1917 a hearing was had by the District Court on the petition and supplemental petition and upon divers motions of various defendants to dismiss the same and a decree was made dismissing the suit, from which decree this appeal was prosecuted.

**SPECIFICATION OF ERRORS**

The District Court erred

1. In holding that the orders of the Interstate Commerce Commission of June 5, 1916, and July 13, 1916 were within its jurisdiction and authority, and that the increased rates, the collection of which was sought to be enjoined, were filed according to law and in pursuance of the authority of the orders of the Commission and with the consent of the Commission, [Assignment of Errors, Paragraphs II and III] (\*111), because

(a) None of the carriers named as defendants and none of the other carriers that were parties to Fourth Section Application No. 10336 applied to the Commission by petition or otherwise to re-open Fourth Section Application No. 10336, and, lacking such application from one or more of the carriers, the Commission exceeded its jurisdiction and went beyond its lawful powers in making its order of April 1, 1916, purporting to re-open for further consideration Fourth Section Application No. 10336 and in holding a hearing pursuant to its order of April 1, 1916, and in taking testimony respecting changed conditions as a basis for a modification of its Fourth Section Order No. 5409. At the hearing last mentioned the defendant carriers and all the other transcontinental railroads opposed any change in the existing west-bound rates on iron and steel from Pittsburgh to Seattle, but the Spokane Merchants' Association and the Railroad Commission of Nevada introduced testimony to support their claim that by reason of the west-bound transcontinental rates in effect to Pacific coast ports the communities in the intermountain territory which they represented were discriminated against unjustly and this was the particular and sole matter submitted at the hearing for the consideration of the Commission.

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\* Numbers in ( ) refer to pages of the Transcript of Record.

(b) At the hearing which culminated in the Commission's order of June 5, 1916, as amended July 13, 1916, no proposed increased rates on iron and steel articles or on any commodities whatsoever were considered by the Commission and no schedules of proposed increased rates had been filed with the Commission by any of the defendant carriers or transcontinental railroads.

(c) The Commission's orders of June 5, 1916, and July 13, 1916, did not require the carriers to comply with them by increasing their west-bound transcontinental rates to Pacific coast terminals, but the carriers might have obeyed the orders by reducing their rates to directly intermediate points without disturbing their rates to the terminals.

(d) To the extent that the Commission's orders of June 5, 1916, and July 13, 1916, authorized or permitted the carriers to increase their rates on iron and steel articles from Pittsburgh to Seattle from 65 cents to 75 cents they were in direct violation of the last paragraph of the fourth section.

(e) The publication by the carriers of rates of 75 cents on iron and steel articles from Pittsburgh to Seattle and the exaction of such rates on and after December 30, 1916, were not justified in the manner prescribed by the last paragraph of the fourth section and therefore were illegal and void.

(f) The rate of 65 cents on iron and steel articles from Pittsburgh to Seattle was reduced from 80 cents to meet water competition, which had been eliminated prior to November 18, 1916, on which date the rate of 75 cents was published to be effective December 30, 1916. The Commission never has held a hearing to determine whether the proposed increase of the rate from 65 cents to 75 cents rested upon changed conditions other than the elimination of such water competition.

(g) The increased rates of 75 cents on iron and steel articles from Pittsburgh to Seattle which were exacted by the carriers on and after December 30, 1916, did not rest



on changed conditions other than the elimination of water competition and no changes in conditions with respect to the transportation of this traffic other than the elimination of water competition took place after April 10, 1916, when the rate of 65 cents became effective.

(h) After the carriers had published on July 28, 1918, a rate of 94 cents to become effective September 1, 1916, the Commission's order of June 5, 1916, as amended July 13, 1916, became *functus officio* so far as Fourth Section Application No. 10336 was concerned, and the Commission went beyond its lawful powers in attempting by its order of September 19, 1916, further to amend as of August 31, 1916, its order of June 5, 1916, as amended July 13, 1916, so as to make the same effective December 30, 1916, instead of September 1, 1916.

(i) None of the carriers named as defendants and none of the other carriers that were parties to Fourth Section Application No. 10336 applied to the Commission by petition or otherwise to reopen Fourth Section Application No. 10336 and, lacking such application from one or more of the carriers, the Commission exceeded its jurisdiction and went beyond its lawful powers in making its order of October 17, 1916, purporting to reopen for further hearing Fourth Section Application No. 10336 respecting rates on iron and steel articles in carloads from Pittsburgh to Seattle.

(j) After the carriers had published on July 28, 1916, a rate of 94 cents to become effective September 1, 1916, the Commission's order of June 5, 1916, as amended July 13, 1916, became *functus officio* so far as Fourth Section Application No. 10336 was concerned, and the Commission went beyond its lawful powers in attempting by its order of November 13, 1916, to postpone beyond December 30, 1916, until further order of the Commission the effective date of its order of June 5, 1916, as amended July 13, 1916.

(k) On November 18, 1918, when the rate of 75 cents was published to become effective December 30, 1916, the effective date of the Commission's order of June 5, 1916, as amended July 13, 1916, had been attempted to be postponed beyond December 30, 1916, until the further order of the Commission and the carriers acted under no legal compulsion in increasing the rate from 65 cents to 75 cents.

2. In denying by its order of December 29, 1916, the application of the petitioner for a temporary or interlocutory order suspending orders of the Interstate Commerce Commission mentioned in the prayer of the petition herein and restraining the defendant railroad companies from enforcing or collecting rates on iron and steel articles from Pittsburgh and other eastern defined territory to Pacific coast terminals, under Supplement 18 to Transcontinental Tariff No. 4-M, I. C. C. No. 1020, described in the petition herein. [Assignment of Errors, Paragraph I, (111).]

3. In ordering, adjudging, and decreeing that "the Petition and Supplemental Petition herein do not state any cause of action against said defendants or any of them." [Assignment of Errors, Paragraph IV (111).]

4. In ordering, adjudging, and decreeing that "this cause be and the same is hereby dismissed." [Assignment of Errors, Paragraph V (111).]

5. In adjudging, ordering, and decreeing that "the defendants and each of them, save and except the defendants Bessemer and Lake Erie Railroad Company, the Baltimore and Ohio Railroad Company, Pennsylvania Company, and the Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company, do have and recover against the petitioner their costs and disbursements to be taxed." [Assignment of Errors, Paragraph VI (111).]

6. In entering, on February 26, 1917, the following decree:

"That the Petition and Supplemental Petition herein do not state any cause of action against said defendants or any of them, and this cause be and the same is hereby dismissed, and that the defendants and each of them, save and except the defendants Bessemer and Lake Erie Railroad Company, The Baltimore and Ohio Railroad Company, Pennsylvania Company, and the Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company, do have and recover against the petitioner their costs and disbursements to be taxed at the foot hereof." [Assignment of Errors, Paragraph VII (111, 112).]

7. In not granting the prayer of the petitioner for a final and perpetual injunction against the defendants in the respects specified and on the grounds set forth in the petition and in the supplemental petition. [Assignment of Errors, Paragraph VIII (112).]

8. In not adjudging that the petition and the supplemental petition state a good cause of action or suit against the defendants. [Assignment of Errors, Paragraph IX (112).]

9. In not denying the motions of the defendants to dismiss the petition and the supplemental petition. [Assignment of Errors, Paragraph X (112).]

10. In not adjudging that the petitioner by its petition and amended petition showed itself entitled to the relief prayed for therein as against the motions to dismiss filed by the defendants. [Assignment of Errors, Paragraph XI (112).]

11. In entering a final order or decree in this cause against the petitioner and in favor of the defendants. [Assignment of Errors, Paragraph XII (112).]

12. In not granting petitioner the relief prayed for by it in the petition and the supplemental petition. [Assignment of Errors, Paragraph XIII (112).]

## ARGUMENT

## I.

The District Court had jurisdiction of the subject matter of the suit.

The Commission moved to dismiss the petition for the reason that it did not present a justiciable issue triable by the Court (60).

Jurisdiction is vested in the several district courts of the United States over all cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission. (38 Stat. L., 219; 26 Stat. L., 539.)

*McLean Lumber Company v. United States*, 237 Fed. 460, was a suit by shippers to enjoin enforcement of an order of the Commission fixing increased rates. On motions to dismiss the petition the Court held that a shipper's right to have his property carried at a reasonable rate in the transaction of his business is a right of property, to enforce which he may seek in the District Court injunctive relief against an unwarranted order of the Commission, especially where, as here, the shipper had protested to the Commission against the proposed increased rates.

In *Peavey & Company v. Union Pacific Railroad Company*, and *Diffenbaugh v. Interstate Commerce Commission*, 176 Fed. 409, decrees were made annulling orders of the Commission forbidding the payment of allowances for the elevation of grain. In the *Diffenbaugh* case the right of the plaintiffs to maintain the suit was denied by the Commission but was upheld by the Circuit Court, which said on this point at page 417 of its opinion:

"A careful search of the interstate commerce act discloses no limitation of the parties who may maintain suits to enjoin, set aside, annul or suspend an order of the Commission to those who were parties to the proceeding before it upon which the order was based. The proceeding in the court is not an appeal; it is a plenary suit in equity. Under the general rules

and practice in equity any party whose rights of property are in danger of irreparable injury from an unauthorized order of the Commission may appeal to a federal court of equity for relief."

These cases were affirmed on appeal to this Court, which said (222 U. S. 42, 49) :

"The jurisdiction in the *Diffenbaugh* case was doubted. . . . We are content to leave that matter on the statement of the court below. 176 Fed. 416, 417. The plaintiffs are affected by the order, and it is just that they should have a chance to be heard, although not parties before the Commission."

The District Court, therefore, decided correctly that it had jurisdiction of the subject matter of this suit.

## II.

### **Filing the supplemental petition was proper practice.**

Certain of the defendants in the District Court moved to dismiss the supplemental petition for the reason that "the allegations made and relief sought by said supplemental petition are not germane to the original petition herein and are not the proper subject for a supplemental petition in this case" (100).

After the original petition was filed, the rates therein attacked were suspended by the Commission and later were cancelled by the carriers, which published in lieu thereof other increased rates, and the Commission attempted twice to extend the effective date of its order of June 5, 1916, as amended July 13, 1916. The prayer of the petition asked that the carrier defendants be restrained "from collecting or exacting on and after September 1, 1916, the increased rates on iron and steel articles in carloads from Pittsburgh to Pacific coast ports published in Supplement No. 11 to Tariff 4-M, or any rates thereon in excess of the rates now in effect." The supplemental petition did not develop a new theory for

the petitioner's case. The violation of the same law in the same way and with the same justification therefor claimed by the carriers was alleged both in the petition and in the supplemental petition, which in setting forth these material facts brought the history of the case down to date. The use of such a pleading is recognized in equity rule No. 34, and no question of the propriety of such practice was made in *Louisville & Nashville Railroad Company v. United States*, 225 Fed. 571, 574, which was a suit for an injunction to restrain the enforcement of an order of the Commission.

In this suit the supplemental petition was filed by leave of the District Court (72), which manifestly did not abuse its discretion in giving the petitioner such permission.

### III.

**The venue of the suit was laid properly in the District of Oregon.**

Some of the defendants in the District Court, including the United States, moved to dismiss the petition (56, 57, 59, 66) for want of jurisdiction, stating in their motions that the proper venue for the suit was either the Eastern District of the State of Washington or the District of Nevada, because the order of the Commission of June 5, 1916, as amended July 13, 1916, was made as they claimed, upon the petition of Merchants' Association of Spokane, Washington, and of the Nevada Railroad Commission. Certain of the carriers did not make this objection to the jurisdiction (53, 54, 55) nor did the Commission (60), which on the contrary asserted (102) in its motion to dismiss that "the order in controversy was confessedly based upon applications for relief made by the carriers under the fourth section of the act to regulate commerce."

The District Court Jurisdiction Act, 38 Stat. L., 219, provides that

"The venue of any suit hereafter brought to enforce, suspend or set aside, in whole or in part, any order of the Interstate Commerce Commission shall be in the judicial district wherein is the residence of the party or any of the parties upon whose petition the order was made" . . .

The Commission's order of June 5, 1916 (34), as amended July 13, 1916 (35), is sought in part to be suspended and set aside in this suit. Only those parts of these orders that related to Fourth Section Application No. 10336 and to Fourth Section Order No. 5409 (24) are involved in this litigation.

Oregon-Washington Railroad & Navigation Company was a party defendant in the District Court and is one of the appellees here. It is a corporation organized and existing under the laws of Oregon (17) and was one of the carriers which made to the Commission Fourth Section Application No. 10336 (20). It is a resident of the District of Oregon within the meaning of the District Court Jurisdiction Act. *Shaw v. Quincy Mining Company*, 145 U. S. 444. The title (34) of the Commission's order of June 5, 1916, as amended July 13, 1916, is

"In the matter of Re-opening Fourth Section Applications 205, . . . 10336," . . .

*United States v. Merchants' & Manufacturers' Traffic Association*, 242 U. S. 178, was a suit for an injunction to restrain the enforcement of a part of the Commission's Amended Fourth Section Order No. 124. In its opinion this Court said at page 188:

"The carrier is the only necessary party to the proceeding under section 4. The Commission represents the public. While it is proper and customary for communities or shippers interested to participate in hearings held, there is no provision for notice to them. They are not bound by the order entered" . . .



The participation of the Merchants' Association of Spokane and of the Nevada Railroad Commission in the proceedings initiated by the filing of Fourth Section Application No. 10336 and culminating in the Commission's order of June 5, 1916, as amended July 13, 1916, was of grace in the guise of strangers to the record and not of right, and their requests that the Commission reopen certain Fourth Section Applications on west-bound trans-continental traffic that had been filed after the fourth section was amended on June 18, 1910, were mere incidents to investigations of wide range and scope both in time and subject matter and did not include No. 10336. So far as this case is concerned, therefore, this question is academic and the District Court rightly ruled that the suit was commenced in the proper judicial district.

#### IV.

**The petitioner is entitled to maintain the suit against the Commission.**

The Commission moved to dismiss (60) the petition for the reason that the petitioner had no interest affected by the order in controversy which entitled it to maintain this suit.

The rates here under attack were increased in pretended compliance with the Commission's order of June 5, 1916, as amended July 13, 1916. The order by its terms did not require the carriers to increase their rates to the terminals but they chose that method of obeying it. The petitioner made a complaint to the Commission against these increases, specifically charging therein the violations of law relied upon in this suit, and requesting that the increased rates be suspended pending a hearing to determine their propriety, but the request was denied. The Commission by this refusal to suspend approved by its tacit acquiescence the carrier's choice of a method of complying with its order and in effect authorized them to vio-

late the law. It is not disputed that the increased rates added at least \$150,000 to the cost of conducting the petitioner's business (87), and it is idle to say that the order in controversy did not affect its interests.

In the *McLean Lumber Company* case, above mentioned, this very same contention was made by the Commission in support of its motion to dismiss the petition there, but it was denied by the Court, which said at page 464 of the reported opinion :

"The petitioners have such interest in the rates ordered by the Commission to be put into effect as to entitle them to maintain this proceeding. They are manufacturers of lumber, having mills at Chattanooga, constructed and equipped at large expense, to whose operation, as they allege, logs purchased along the line of the railroad company in Alabama and Mississippi is the chief and indispensable source of supply; and, as they allege, the increased rates on these logs fixed by the orders of the Commission has caused the plant of one of the petitioners to be wholly abandoned, that of another to be shut down, and those of the two others to be greatly limited in their operations. Under the allegations of the petition they are directly affected in the conduct of their business by the orders of the Commission; and if the rates fixed by these orders are unreasonably high, have suffered and will suffer great pecuniary damage."

And in the *Pearcy* case, above cited, the Circuit Court said at page 415 of its reported opinion :

"The Interstate Commerce Act authorizes incorporated boards of trade of cities and associations of like character to apply to the Commission for relief, and such corporations and members representing such associations may likewise apply to the court for relief from injuries unlawfully inflicted by the Commission."

In a more recent case entitled *Merchants and Manufacturers' Traffic Association v. United States*, 231 Fed.

292, the petitioners asked for an injunction to restrain the Commission from enforcing certain orders. At page 294 of the reported decision the Court said:

"A preliminary motion to dismiss the bill has been made by the United States on grounds that appear to be sufficiently stated in the objections that the petitioners do not bring the suit as common carriers or as shippers; that they have no such interest in the orders of the Interstate Commerce Commission sought to be annulled and enjoined as to enable them to maintain the suit; that it does not appear that they will sustain irreparable injury, or any injury, by reason of any orders of the Commission made subject of complaint; and that the petitioners have no standing in a court of equity to maintain the suit.

Three of the petitioners are traffic associations formed for the purpose of representing jobbers and merchants located at Sacramento, Stockton, and San Jose in traffic matters in which all the parties represented are interested. The remaining petitioner, Santa Clara, is a municipal corporation representing the interests of the citizens of that municipality."

The Court then, after referring to certain provisions of section 13 of the act to regulate commerce, quoted from section 2 of the act approved February 19, 1903 (32 Stat. L., 847, 848) as follows:

"That in any proceeding for the enforcement of the provisions of the statutes relating to interstate commerce, whether such proceedings be instituted before the Interstate Commerce Commission or be begun originally in any Circuit Court of the United States, it shall be lawful to include as parties, in addition to the carrier, all persons interested in or affected by the rate, regulation or practice under consideration, and inquiries, investigations, orders, and decrees may be made with reference to and against such additional parties in the same manner, to the same extent, and subject to the same provisions as are or shall be authorized by law with respect to carriers."

Continuing, the Court then said:

"The purpose of these statutes is plainly to meet a situation and bring in all parties interested in the controversy, to the end that the entire question involved may be settled and determined in the one proceeding. Such being the purpose, we see no objection to classes of persons similarly situated being represented by an association or other organization and coming into the controversy under the common name. . . .

We think . . . this action may be maintained by the petitioners. The motion to dismiss is therefore denied."

*A fortiori* would the same rule apply in the case of one shipper such as appellant, that was complainant in such a suit.

Although the decree in this suit was reversed subsequently on appeal, the reversal was not upon the ground that any of the questions raised by the motion to dismiss were decided erroneously by the District Court.

In the act abolishing the Commerce Court (38 Stat. L., 219) it was provided that the "procedure in the district courts in respect to cases of which jurisdiction is conferred upon them by this act shall be the same as that heretofore prevailing in the Commerce Court." That procedure was defined in sections 4 and 5 of the act creating the Commerce Court (36 Stat. L., 539). By section 5 it was provided

"That the Interstate Commerce Commission and any party or parties in interest to the proceeding before the Commission, in which an order or requirement is made, may appear as parties thereto of their own motion and as of right, and be represented by their counsel, in any suit wherein is involved the validity of such order or requirement or any part thereof, and the interest of such party; and the court wherein is pending such suit may make all such rules and orders as to such appearances and representations, the number of counsel, and all matters of procedure, and otherwise, as to subserve the ends of justice and speed the deter-

mination of such suits: Provided further, that communities, associations, corporations, firms, and individuals who are interested in the controversy or question before the Interstate Commerce Commission, or in any suit which may be brought by anyone under the terms of this Act, or the Acts of which it is amendatory or which are amendatory of it, relating to action of the Interstate Commerce Commission, may intervene in said suit or proceedings at any time after the institution thereof, and the Attorney General shall not dispose of or discontinue said suit or proceeding over the objection of such party or intervenor aforesaid, but said intervenor or intervenors may prosecute, defend, or continue said suit or proceeding unaffected by the action or nonaction of the Attorney General of the United States therein.

Complainants before the Interstate Commerce Commission interested in a case shall have the right to appear and be made parties to the case and be represented before the courts by counsel under such regulations as are now permitted in similar circumstances under the rules and practice of equity courts of the United States."

The two increases in rates proposed were protested (38, 86) seasonably by the appellant. The Commission sustained the first of these protests and suspended the proposed increased rates, but denied the second. In a proceeding entitled *Car Float Service*, 49 I. C. C. 261, the Commission said:

"A protest is a complaint. The act provides that no complaint shall at any time be dismissed because of the absence of direct damage to the complainant."

From the foregoing excerpts from the federal statutes and from decided cases, it is manifest that Congress intended that a shipper should have the right to maintain a suit against the Commission under circumstances such as are disclosed here, and the District Court was clearly right in overruling the Commission's motion to dismiss based upon the ground that the petitioner had no interest

affected by the order in controversy which entitled it to maintain the suit.

## V.

**The rates exacted from the appellant on and after December 30, 1916, were increased in direct violation of law.**

The last paragraph of the fourth section of the act to regulate commerce as amended June 18, 1910, provides:

"Whenever a carrier by railroad shall in competition with a water route or routes reduce the rates on the carriage of any species of freight to or from competitive points, it shall not be permitted to increase such rates unless after hearing by the Interstate Commerce Commission it shall be found that such proposed increase rests upon changed conditions other than the elimination of water competition."

This provision of law is the foundation of the suit.

**1. The transcontinental carriers by railroad on April 10, 1916, reduced to 65 cents the rate of 80 cents that was in effect prior thereto on iron and steel articles in carloads from Pittsburgh to Seattle in competition with carriers of like traffic over water routes from the Atlantic seaboard to Pacific coast ports through the Panama canal.**

The carriers' Fourth Section Application No. 10336 was based upon their avowed and express purpose and desire to compete more effectively at Seattle and other Pacific coast terminals with carriers by water of iron and steel articles from eastern defined territory, including Pittsburgh, as appears from the Commission's report of March 1, 1916 (21-24), made in response to Application No. 10336. The Commission by its Fourth Section Order No. 5409 (24) granted in part Application No. 10336, and the carriers thereupon reduced the rate to 65 cents. These facts were averred in the petition (25) and on motion to dismiss must be treated as true. *Lowenthal v. Georgia Coast & Piedmont Railroad Company*, 233

Fed. 1010. Furthermore, they were not denied or disputed by any of the defendants in the District Court either in the pleadings or in argument.

**2. The rates so reduced on account of water competition were increased without a hearing by the Commission.**

The increased rates exacted for the transportation of appellant's shipments were published on November 18, 1916 (85), when the carriers issued Supplement No. 18 to Transcontinental Freight Bureau West-Bound Tariff No. 4-M. It was alleged in the supplemental petition (88) that no hearing was held by the Commission to determine whether the increased rates published in Supplement No. 18 to Tariff 4-M to Pacific coast ports rested upon changed conditions other than the elimination of water competition. Neither the Commission nor any other party to the suit pretends that any such hearing or any hearing whatever concerning the reasonableness, propriety or legality of the proposed increased rates was held by the Commission after Supplement No. 18 was issued on November 18, 1916, and before its effective date of December 30, 1916. And this was so, notwithstanding the appellant seasonably filed with the Commission a complaint (86) challenging the lawfulness of the proposed increases upon the ground that they were in direct violation of the last paragraph of the fourth section, and requesting the Commission to enter upon a hearing concerning their propriety. The Commission denied this complaint and request and allowed the proposed increased rates to become effective on December 30, 1916.

In its motion to dismiss the petition (60) the Commission said that the petitioner had a full hearing before it "upon all the questions presented in the said petition in the proceeding in which the order in controversy was entered." This manifestly refers to the proceeding reported in 40 I. C. C. 35 under the title "In the Matter of Re-opening Fourth Section Applications Nos. 205, . . .



10336," . . . and decided June 5, 1916, and to the order based thereon, which was amended on July 13, 1916, in respects not of consequence in this suit (28-36). It is obvious that Supplement No. 18 to Tariff 4-M, which was not issued until November 18, 1916, and in which were published the rates that were exacted from appellant on and after December 30, 1916, were not and could not have been before the Commission for its consideration in the proceeding which culminated in its report and order of June 5, 1916, as amended July 13, 1916, nor does the Commission make any such claim in its motions to dismiss (60, 101) or at any other stage of the suit. The rates on iron and steel from Pittsburgh to Seattle that were in effect when the Commission held the hearing that resulted in its order of June 5, 1916, as amended July 13, 1916, were 65 cents (25), and the carriers not only did not propose to increase those rates but, on the contrary, opposed any change therein (27).

Although there was a hearing by the Commission that culminated in its order of June 5, 1916, as amended July 13, 1916, yet the subject matter of that hearing was not any schedule of proposed increased rates whatever but complaints by the Spokane Merchants' Association and the Railroad Commission of Nevada that by reason of the west-bound transcontinental rates to Pacific coast ports in effect at the time of the hearing on April 24, 1916 (29), the communities in the intermountain territory which they represented were discriminated against unjustly in violation of sections 2 and 3 of the act to regulate commerce (27). The allegation in the petition (41) that the Commission held no hearing to determine the propriety and lawfulness of the proposed increased rates apparently is sought to be met in the Commission's motion to dismiss (60) by the assertion that there was a full hearing on April 24, 1916, upon another matter, that the proceedings in connection therewith were regular and not arbitrary or unsupported by substantial evidence,

and that therefore the appellant is bound by the order of June 5, 1916, as amended July 13, 1916. But these contentions seem to have been abandoned later when the Commission filed its motion to dismiss the petition as amended (101), and whether they were or not, it is clear that a failure to hold a particular hearing required by law upon a specified subject is not excused by holding one hearing or twenty hearings upon quite different matters.

**3. The Commission was a proper party defendant to the suit in the District Court and the relief prayed against it should be granted.**

By its report and order of June 5, 1916, as amended July 13, 1916, the Commission sustained in part the claims of discrimination (27) made by the Spokane Merchants' Association and the Railroad Commission of Nevada. As a remedy for the discrimination so found to exist the Commission rescinded in part (34) the relief previously afforded by it from the requirements of the fourth section and ordered the carriers to readjust their rates accordingly. The effect of complying with the Commission's order would have been to lessen the difference between the rates to the terminals and to points directly intermediate. For example, on June 5, 1916, when the Commission made its order, the rate on iron and steel from Pittsburgh was 65 cents to Seattle and 95 cents to Spokane, a point directly intermediate. The difference between these rates was then 30 cents. A compliance with this order would have reduced this difference to  $9\frac{3}{4}$  cents, if the rate of 65 cents to Seattle had remained the same. If the rate of 95 cents to Spokane had remained unchanged, the rate to Seattle must have been increased to 82.6 cents, and the difference would have been 12.4 cents between the two rates. In other words, the railroads might have complied with the Commission's order and left either the terminal rate or the

intermediate rate undisturbed, or increased the one and reduced the other, or indeed made them the same, provided the readjusted rates bore such a relation to each other that the one to the intermediate point (Spokane) did not exceed the other to the terminal (Seattle) by more than 15 per cent. on iron and steel shipped from Pittsburgh, this being the maximum limit of the readjustment authorized in accordance with the requirements of Fourth Section Order No. 124 of April 30, 1915, as to commodities other than those listed under schedule C(34).

In this sense the Commission's order *was* permissive, as it said in its motion to dismiss (102), in that it did not require in terms the increase of the terminal rate. But the vice of the order, so far as this suit is concerned, lies in the very fact that it was permissive, that is to say, it undertook to authorize the carriers, against which it ran, to obey it by a method directly forbidden by law, namely, the last paragraph of the fourth section.

The order rescinded the fourth section relief previously afforded and in reality was tantamount to an order requiring the carriers to cease from discriminating against intermediate points like Spokane. Ordinarily such an order may be obeyed in two ways—by reducing the rate at the disfavored point or by increasing it at the favored point. As this Court said in *St. Louis Southwestern Railway Company v. United States*, 245 U. S. 136, 145:

“Orders to remove discrimination, as commonly framed, do not fix rates. They merely determine the relation of rates, by prohibiting the carrier from charging more for carriage to one locality than, under similar conditions, to another; and they usually leave the carriers free to remove the discrimination either by raising the lower rate or by lowering the higher rate, or by doing both.”

But in the situation out of which this suit arose the

carriers had no such option because the law in express terms forbade increasing the rate to the favored point, Seattle, pending a hearing and determination by the Commission that the proposed increase rested upon changed conditions other than the elimination of water competition. Notwithstanding this the Commission by its order undertook to give the carriers this option, and in its report upon which the order was based intimated its approval of an increase in the rates to the terminals to remove the discrimination found to exist, as is shown by the following language therefrom (32):

"If the rail rates between the two coasts, established in the light of conditions then existing, should, through such a complete change of conditions as that which has so recently come about, be now at a level so low as to make the service between the two coasts unattractive to the boat lines, should they be re-adjusted to a basis that will attract the water carriers back to the service and the primary purpose of the section be achieved or should they be held at the present level and the legislative purpose to a certain extent be defeated?"

A word to the wise was sufficient and the carriers, not anxious to increase the terminal rates (27) but still more solicitous not to reduce any rates in complying with the order, attempted to increase the rate to the terminals from 65 cents to 94 cents (36) in pretended compliance with the order, which attempt was frustrated by a suspension order of the Commission (62), and later actually did increase the rate from 65 cents to 75 cents (85) over appellant's unavailing complaint and protest to the Commission (86).

The relief, that was asked against the Commission, was of narrow scope. Its order was sought to be annulled and set aside only so far as it undertook or attempted or purported to authorize the carriers to increase the rates on iron and steel articles from Pitts-

burgh to Seattle (41, 89), and then only until the Commission should have held a hearing pursuant to the requirements of the last paragraph of the fourth section to determine whether the proposed increases rested upon changed conditions other than the elimination of water competition.

The appellant seasonably complained (38, 86) to the Commission of the increases proposed, alleging that they violated the last paragraph of the fourth section and asking for a hearing, which the Commission denied. Under these circumstances it would seem that the Commission should not be heard to object to the granting of the relief asked by appellant, when it has failed to follow a plain mandate of the law and when it could relieve itself at any time from the restraint imposed by holding such hearing.

**4. The Commission exceeded its jurisdiction and went beyond its lawful powers in making its order of April 1, 1916, (25) purporting to re-open for further consideration Fourth Section Application No. 10336.**

Section 4 of the act to regulate commerce makes it unlawful for a carrier to charge any greater compensation for a shorter haul than for a longer distance over the same line in the same direction, the shorter being included within the longer distance, but also embodies a proviso that "upon application to the Interstate Commerce Commission such common carrier may in special cases, after investigation, be authorized by the Commission to charge less for longer than for shorter distances for the transportation of passengers or property; and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section." The words, *upon application*, in this excerpt from the statute seem to indicate a clearly expressed legislative intent to make an application by the carrier a prerequisite to the grant-

ing of fourth section relief originally and to the modification from time to time by the Commission of the original relief afforded.

Although this Court said in *United States v. Merchants & Manufacturers' Traffic Association*, 242 U. S. 178, 187, that "it may be doubted whether application by the carrier is a prerequisite to the granting of relief" from the requirements of section 4, yet that precise question was not involved in that case and the Court's passing comment thereon seems rather in the nature of *obiter dicta* than a decision of the point.

But in the pending suit this precise question is in issue (27), and the carriers not only did not apply to the Commission by petition or otherwise to reopen Fourth Section Application No. 10336 but opposed any change in their rates on iron and steel articles from Pittsburgh to Pacific coast ports. Nor was Fourth Section Application No. 10336 sought to be reopened upon application either of Spokane Merchants' Association (66), or of the Railroad Commission of Nevada (69), but the Commission acted on its own motion in reopening Application No. 10336 for further consideration. This action was in plain contravention of the statute as it is written. To hold that application by the carrier is not an indispensable prerequisite to the granting of fourth section relief or to the modification of relief previously afforded is to read into the law something which is not there. The statute is plain and unambiguous. Lacking an application by the carriers, the Commission did not acquire jurisdiction to reopen application No. 10336 for further hearing and its order of June 5, 1916, as amended July 13, 1916, was null and void, so far as it purported to modify the relief granted by Fourth Section Order No. 5409 (24), and ought to be set aside. The same is true of the Commission's order of October 17, 1916, purporting to reopen for further hearing Fourth Section Application No. 10336 (80).

5. Even if the Commission's order be assumed to have been valid, when made, it became on September 1, 1916, *functus officio* and constituted no justification to the carriers for publishing increased rates on iron and steel articles from Pittsburgh to Seattle.

The carriers in pretended compliance with the Commission's order issued on July 28, 1916 Supplement No. 11 to Tariff 4-M, which supplement was noted to become effective September 1, 1916, and in which were published in lieu of the existing rates of 65 cents on iron and steel articles from Pittsburgh to Seattle rates of 94 cents (36). The *compliance* is said to have been *pretended* because it violated the spirit of the order, although not the letter. The proposed increased rates of 94 cents on August 29, 1916 were suspended by the Commission until December 30, 1916 (76), but the effective date of its order of June 5, 1916, as amended was not extended. Later the carriers cancelled with the Commission's consent (83) the rates of 94 cents that had been suspended, but meanwhile the Commission, awakening to the realization that the effective date of its order had passed and yet the rates it had required to be published were not in effect, on September 19, 1916, made an order and attempted thereby further to amend as of date of August 31, 1916, its order of June 5, 1916, as amended July 13, 1916, so as to become effective December 30, 1916, instead of September 1, 1916 (79). When the carriers published and filed the rates of 94 cents to become effective September 1, 1916, they had complied literally with the Commission's order, so far as it was in their power, and it was through no fault of theirs that the rates of 94 cents did not become effective September 1, 1916. No responsibility can be charged to the appellant or to the carriers for the Commission's oversight in permitting its order to expire by lapse of time, and the Commission's order of September 19, 1916 (79), was merely an ineffectual attempt to resurrect the dead.



Thereafter on November 13, 1916, the Commission made an order (83) by which it attempted to postpone until its further order its order of June 5, 1916, as amended July 13, 1916. This situation resulted, that there was in existence on November 18, 1916, when the carriers issued and filed (85) Supplement No. 18 to Tariff 4-M (noted to become effective December 30, 1916, and increasing the rates on iron and steel articles from Pittsburgh to Seattle from 65 cents to 75 cents), no effective date for the order of June 5, 1916, as amended July 13, 1916. The Commission's orders of September 19, 1916 (79), and November 13, 1916 (83), were equally futile and it is clear that they did not constitute any justification to the carriers for the increases complained of, although the tariff, in which they were published, was filed in pursuance of authority attempted to be granted by the Commission and with the consent of the Commission.

**6. The Commission's construction of the last paragraph of the fourth section is not binding upon this Court.**

In its report (28) of June 5, 1916, the Commission undertook to construe and interpret the meaning of the last paragraph of the fourth section. It was shown without contradiction by the Pacific coast terminal cities at the hearing culminating in the Commission's report of June 5, 1916, that some of the rates had been reduced subsequent to June 18, 1910, on account of water competition and it was contended that for that reason they could not be increased again under the circumstances then existing because such increases were prohibited by the last paragraph of the fourth section.

The Commission in that report (28) found that the water competition, which had caused the reduction of rates on iron and steel articles from Pittsburgh to Seattle from 80 cents to 65 cents, had been eliminated substantially, saying (33):

"The recent withdrawal of the principal steamship lines, however, and their contracts for use in other lines of service creates a probability that there will be but little effective water service during the current year and perhaps for a considerable period thereafter. We shall therefore rescind, effective September 1, 1916, those portions of our orders relating to the schedule C commodities. . . . The order responding to application No. 10336 respecting rates on iron and steel articles from Pittsburgh and related points will likewise be rescinded, effective September 1, 1916." . . .

It thus appears without dispute that the discrimination found by the Commission to exist against the intermediate points had its very basis and foundation in the substantial elimination of the identical water competition that had caused the reduction of the rates to the terminal cities. From this administrative action of the Commission in finding that the then existing adjustment of rates was unjustly discriminatory the appellant seeks no relief in this suit. That was a matter upon which the Commission's conclusion was final, although the appellant and all the Pacific coast terminal cities then felt and now believe that the Commission erred in so finding. But the grievance of the appellant in this suit, so far as the Commission is concerned, is that it sanctioned a method of compliance by the carriers with its order that was forbidden by a direct and positive provision of law, namely, the last paragraph of the fourth section. Its sanction resulted from its conviction that the statute was not applicable, because, as it said (32) in its report of June 5, 1916, "The temporary withdrawal of the canal service in this instance is clearly not the result of any act of the carriers or of this Commission."

The vice of this view is that it requires reading into the law something which is not there. In other words, the Commission construes the statute as if it read:

"Whenever a carrier by railroad shall in competition with a water route or routes reduce the rates on

the carriage of any species of freight to or from competitive points, it shall not be permitted to increase such rates unless after hearing by the Interstate Commerce Commission it shall be found that such proposed increase rests upon changed conditions other than the elimination of water competition *by such carrier by railroad or as the result of any act of the Commission.*"

It is evident at once that such a construction greatly narrows the scope of a plain and unambiguous provision of law as it was enacted by Congress. If the appellant has brought itself within the terms of the statute as it was written, it is entitled to the benefit thereof as of right. If the Commission argues that in enacting this law Congress did not contemplate such a situation as existed when its report and order of June 5, 1916, were made and that other considerations of public policy led to the adoption of this particular provision of the statute, the answer is that the courts should enforce the law as it was written and not by construction of clear, plain and precise language attempt to give effect to a supposed but unexpressed intention of Congress.

Other language in the report of June 5, 1916, throws a significant light upon the Commission's view of the statute. For example, the process of reasoning by which it reached its conclusion upon the proper meaning of the law is disclosed in the following excerpt:

"The purpose of this clause was the preservation of water competition. It was intended to act as a restraint against rail carriers reducing their rates between competitive points to such a level as to render the water service between such points unremunerative and unattractive. Should a rail carrier operating a route between competitive points in competition with a water route depress its rates, *without authority of the Commission*, to a level so low as to drive the water carrier from the field, the rail carrier is prohibited from thereafter increasing its rates except by permission of this Commission, and such permission cannot be extended unless reasons for the

proposed increases are shown other than the elimination of the water competition. In the situation here considered, however, the carriers sought authority from this Commission to make the reductions which have been made."

The Commission then said, after stating that it had held hearings and made a careful examination of each proposed rate both to the coast points and to intermediate points and had determined (1) that the proposed rates to the coast points were warranted by the competition there existing, and (2) that the lower terminal rates proposed were such as more than to cover the out of pocket costs of the rail carriers that performed the service (32) :

. . . "the Commission itself fixed the relative measure of the rates to intermediate points in the case of the west-bound rates . . . under the conviction that the rates to . . . intermediate points so proposed did not unjustly discriminate against such points. The carriers have proceeded in this case *under the authority of the Commission* to make only such rates to the coast points as would enable them to compete for and share in this traffic, and the withdrawal of boats from this service has not been on account of the rates made by the rail carriers with which the boats compete, but on account of slides in the Panama Canal and the extraordinary rise in ocean freights."

This reasoning will not stand analysis. Rail carriers may establish rates to meet water competition but cannot be compelled to do so. It was not necessary for the carriers to obtain permission from the Commission to reduce the rate on iron and steel articles from Pittsburgh to Seattle from 80 cents to 65 cents. It would have been lawful for them to make that reduction without previous application to the Commission if they had made contemporaneously the rates to directly intermediate points no higher than to the terminal.

This condition attaching to the right of the rail carriers to meet water competition at the more distant point results, not from any order or requirement of the Commission, but from the long and short haul rule of the fourth section. The rail carriers were compelled to obtain the Commission's permission, not to reduce rates to the terminal points, but to maintain to directly intermediate points rates higher than those contemporaneously in effect to the terminals. The Commission is authorized and empowered by the fourth section to grant relief to the carriers in special cases from the requirements of the long and short haul rule, and when such permission has been given the apparent discrimination or prejudice against the intermediate points resulting from such an adjustment of rates to those points and to the terminals cannot be considered undue or unjust within the meaning of sections 2 and 3 of the act.

The Commission's view of the last paragraph of the fourth section is that its provisions do not apply except to cases where the carriers have reduced their rates to meet water competition *without authority of the Commission*. In other words, the last paragraph of the fourth section as construed by the Commission would read as follows:

"Whenever a carrier by railroad shall in competition with a water route or routes reduce *without authority of the Commission* the rates on the carriage of any species of freight to or from competitive points, it shall not be permitted to increase such rates unless after hearing by the Interstate Commerce Commission it shall be found that such proposed increase rests upon changed conditions other than the elimination of water competition."

There is not the slightest warrant for reading the words, "without authority of the Commission" into the law.

If the Commission's understanding of the statute be cast into affirmative instead of negative form, the last paragraph of the fourth section would read as follows:

"Whenever a carrier by railroad shall in competition with a water route or routes reduce the rates on the carriage of any species of freight to or from competitive points *under the authority of the Commission*, it may increase such rates without a hearing by the Interstate Commerce Commission and without a finding that such proposed increase rests upon changed conditions other than the elimination of water competition."

If Congress intended such a result, why did it not use apt language to express its intention?

It is inconceivable that Congress would have enacted the statute in the form just set forth and the Commission ought not to be permitted by construction to produce a result manifestly not intended by Congress and so clearly at variance with the plain and precise language of the law as it was written.

The Commission says in its motion to dismiss (102) that the last paragraph of the fourth section has no application in cases where it "is administering the long and short haul clause of section 4." This contention is surprisingly inconsistent with what the Commission said in its report of June 5, 1916, on the same subject (31). After quoting the last paragraph of section 4 the Commission says:

"This section of the act must, of course, be construed in the light of the other sections, and in view also of the purpose and intent of this particular section."

There is nothing whatever in the act to indicate that the provision of section 4 relating to water competition was not intended to apply to rates reduced in consequence of orders granting relief from the requirements of the long and short haul rule of the same section. If the Commission's construction of the law be admitted, then the railroads may reduce their rates freely to the more distant competitive point under fourth section orders of the Com-

mission and destroy water competition there, secure in the knowledge that almost surely a complaint, based upon the discrimination produced by the elimination of water competition, will be made by intermediate points and will be sustained by the Commission. An order requiring the removal of the discrimination then would be obeyed by them by increasing their rates to the more distant point, at least to the level of the intermediate rates. All this would have been accomplished without a hearing before the Commission upon the increased rates to the more distant point and without a showing by the railroads that the proposed increases rested upon changed conditions other than the elimination of water competition. The mischief which Congress designed the law to cure would have gone unremedied and the railroads, through the instrumentality of the Commission, would have obtained the desired result, namely, the elimination of water competition at the more distant point, without incurring the penalty that Congress evidently thought it was attaching to such practices when it enacted this law. If the last paragraph of the fourth section be construed not to apply in a case where the rail carrier has been granted fourth section relief on account of water competition at the more distant point, then the law serves no purpose and the manifest object of Congress in enacting it has been defeated.

**7. The relief sought against the railroads should be granted in any event, even if it be denied against the Commission and the United States.**

In its motion to dismiss (102) the Commission set forth numerous reasons why its order should not be set aside. These reasons, however, go much beyond the scope of the relief sought by the appellant and in reality are not questions in the case at all. Indeed, there is no inconsistency in assuming the validity of the Commission's order and nevertheless in granting the desired relief, because the carriers might have obeyed it without increas-



ing the rates to the terminal cities. But the Commission erroneously assumed that it had authority to permit the carriers to increase the terminal rates without a hearing as required by the last paragraph of the fourth section, and only for this reason it and the United States were made defendants to the suit. Granting the relief asked by the appellant would not mean that the carriers would be relieved from obeying the Commission's order, but only that they would be compelled to comply with it in a particular way. If, therefore, the result intended by the Commission's order be effected, why should it be concerned with the means employed to reach the desired end, so long as they are lawful?

But whether the Commission and the United States are or are not proper parties to this suit and whether relief is granted against them or denied does not affect the liability of the railroads. So far as they are concerned it is the same as if the Commission's order never had been made. They reduced their rates to the terminals to meet water competition and then when that water competition had been eliminated they increased them without a preliminary hearing and determination by the Commission that the increases proposed rested upon changed conditions other than the elimination of water competition. The railroads justify their action by saying that it was authorized and sanctioned by the Commission. So it was, but the Commission's sanction having been given in violation of the statute, did not protect them. The law prescribed a plain method for increasing rates which had been reduced under the circumstances disclosed in this suit, but the Commission and the railroads chose not to follow it. Strange to say, the elimination of water competition, that had caused a previous reduction in rates, was the sole basis for the Commission's order requiring a readjustment of the rates and yet was the only condition which the law forbade the carriers' urging and the Com-

mission's considering as a justification for increasing such reduced rates.

Under the circumstances disclosed the terminal rates were increased by the carriers voluntarily and without legal compulsion. Nor is it a good defense to this suit for them to urge that they were not instrumental in eliminating water competition through the canal. If that be conceded it does not help them because the last paragraph of the fourth section does not define or limit the causes from which the elimination of water competition may result. And *elimination* manifestly refers rather to the result produced than the means by which the effect is caused. When water competition is eliminated, it does not exist as an active force to any substantial extent,—it has disappeared, has been discontinued or has abated, at least for the time being. The important thing is the fact, not the name by which it is called. In describing the situation then existing in its report of June 5, 1916, the Commission said (29) :

"The result of all the evidence offered was to show that there is not at this time any effective water competition between the two coasts and that there is little likelihood of any material competition by water during the present calendar year."

And again (30) :

"That the conditions with which we are confronted are but temporary is admitted. How long such conditions will last is problematical."

The fact of the elimination of water competition is not in dispute. It was alleged by direct and positive averment both in the petition (40) and in the supplemental petition (88) and was admitted to be true by the defendants' motions to dismiss. And the Commission in its report of June 5, 1916, so found in substance. In this situation the carriers adopted a method of compliance with the Commission's order that was in violation of law. Only one

lawful course was open to them, and that was to reduce their rates to the intermediate points without disturbing them to the terminals. Upon receipt of the appellant's complaint (86) against the proposed increased rates to the terminals the Commission should have followed the course pursued by it in a proceeding entitled *Lumber from Louisiana Points*, 40 I. C. C. 268, in which it required the cancellation of suspended tariff schedules in which increased rates on lumber were proposed. The Commission found that the proposed rates would increase discrimination that already existed between intermediate and more distant points resulting from a departure from the long and short haul rule of the fourth section, and held to that extent the filing of the suspended tariff schedules was improper, and said at page 271 of its reported opinion, "if they had become effective, they would have been unlawful."

#### 8. The Sacramento case is not in point.

In the District Court the defendants relied upon this Court's decision in *United States v. Merchants and Manufacturers' Traffic Association*, above cited. That case, however, is clearly distinguishable from this, as unmistakably appears from the final paragraph of the opinion, which is as follows:

"It was also contended on behalf of the four cities that the amended orders violated the clause added to Sec. 4 by the Act of June 18, 1910, which provides that 'whenever a carrier by railroad shall in competition with a water route or routes reduce the rates on the carriage of any species of freight to or from competitive points, it shall not be permitted to increase such rates unless after hearing by the Interstate Commerce Commission it shall be found that such proposed increase rests upon changed conditions other than the elimination of water competition.' The answers to this contention are many. What these

four cities complain of is not increase of rates, but the fact that San Francisco and Oakland may be given rates lower than theirs; and they strongly deny that water competition has been eliminated. Indeed, it was the increased effectiveness of water competition due to the opening of the Panama Canal—a notable change in conditions—which compelled the rate readjustment of which they complain; and the higher rates to the interior cities, made under authority of the Commission, were granted after prolonged hearings, as part of the general readjustment of transcontinental rates. The provision relied upon has no application to such a case.”

The facts were that Sacramento, Stockton, San Jose and Santa Clara, California, formerly had enjoyed the same rates on west-bound transcontinental freight as San Francisco and Oakland, but in consequence of certain fourth section orders of the Commission the carriers were authorized to maintain lower rates to the two terminal cities mentioned than to the four intermediate points. At the suit of the latter the District Court enjoined the enforcement of these orders in so far as they authorized the carriers to charge for the transportation of west-bound transcontinental freight destined to Sacramento, Stockton, San Jose and Santa Clara, California, “any greater amount than is concurrently charged for the like carriage of like freight to San Francisco and Oakland, California.” The District Court placed its decision upon the ground that the Commission in making the orders complained of had exceeded its statutory powers in the administration of the long and short haul rule of the fourth section in this, that there had been no previous application by the carriers asking for the precise relief granted. This decree was reversed on appeal and the bill was ordered dismissed.

The only reference to the last paragraph of the fourth section in this Court’s opinion is the paragraph quoted. The difference between that case and this is obvious.

There the complainants strongly denied that water competition had been eliminated; here the appellant just as strongly asserted the contrary, and the fact of such elimination is conceded and not in dispute. In that case the complainants did not complain of an increase of rates, but their grievance was that their competitors might be given lower rates; in this suit the rates were increased against appellant's earnest and repeated protests, and there is no contention by any one that they were not. In the *Sacramento* case no facts were averred or proved to which the provisions of the last paragraph of section four could be applied in reason, and apparently the contention based thereon was only *tabula in naufragio* to the complainants. None of the reasons given by this Court for holding that the last paragraph of the fourth section did not apply in the *Sacramento* case can be urged in this suit against the granting of the relief sought by appellant. This provision of the statute was not construed in the decision of the *Sacramento* case, which clearly is not an authority for a holding against the appellant in this suit.

The points that have been discussed might be elaborated almost indefinitely, but enough has been said to indicate clearly the basis upon which the appellant seeks relief. The facts are not in dispute; the meaning of the laws is. The appellant exhausted every remedy it had to obtain relief before resorting to the courts. This Court held in *Mississippi Railroad Commission v. Mobile & Ohio Railroad Company*, 244 U. S. 388, 392, that a bill in equity is an appropriate remedy to test the lawlessness of an order of a railroad commission. The Commission has frittered away the appellant's rights by construing the law to mean something else than the plain import of its wording. The appellant respectfully submits that this

Court should declare the law to mean what it says, and should reverse the decree of the District Court and grant the relief prayed for.

February 14, 1919.

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# In the Supreme Court of the United States.

OCTOBER TERM, 1918.

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SKINNER AND EDDY CORPORATION, APPELLANT,

v.

THE UNITED STATES OF AMERICA, INTERSTATE Commerce Commission, the Baltimore & Ohio Railroad Company, et al.

No. 215.

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*APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON.*

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## BRIEF FOR THE UNITED STATES.

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### STATEMENT OF CASE.

This is a suit by a shipbuilding company at Seattle, Wash., attacking certain orders made by the Interstate Commerce Commission on June 5 and July 13, 1916, and seeking to enjoin the putting into effect of rates on iron and steel articles in carloads from Pittsburgh, Pa., and other eastern territory to the Pacific Coast ports which were published by the carriers to comply with the orders above mentioned. It is an aftermath of the long-continued controversy over freight rates between coast cities and interior points.

While the prayer of the petition is for an injunction against the orders made by the Interstate Commerce Commission, the real complaint is that, in complying with these orders, the carriers had increased the rates to coast cities when the only lawful way of complying was to reduce the rates to intermediate points. The specific claim is that the rates which were increased had previously been decreased by the railroads in competition with water transportation, and hence could not be legally increased unless, after hearing by the Interstate Commerce Commission, it should be found that the proposed increase rested upon changed conditions other than elimination of water competition, and it is asserted that no such hearing had been had.

#### THE FACTS.

Upon the passage of the act of June 18, 1910, amending section 4 of the original interstate commerce act (36 Stat. c. 309, 539, 547), the railroads involved in this case applied to the Interstate Commerce Commission for authority to charge lower rates from eastern points to points on the Pacific coast than were charged on the same articles from eastern points to intermediate points. By its fourth section Order No. 124, July 31, 1911, the commission granted this relief, and, in compliance with its order, the rate on iron and steel articles in carload lots to the Pacific coast was 80 cents per hundred, while the rate to intermediate points was higher. Later, however,

the Panama Canal was opened and this had the effect of greatly reducing the water rates from the east to Pacific coast cities. The carriers thereupon petitioned the Interstate Commerce Commission for further relief from the amended fourth section of the interstate commerce act. After full hearing, the relief was granted to the extent of authorizing a rate of 55 cents from Chicago and other points and of 65 cents from Pittsburgh and other points to coast cities without changing the rates to intermediate points, and these rates were put into effect. Thereafter, the Nevada Railroad Commission and the Merchants' Association of Spokane, Wash., presented their petition to the commission representing that there had been slides in the Panama Canal which would for an indefinite time interrupt traffic through the canal and that on account of the unusual demand at high rates for shipping occasioned by war conditions the transportation of freight from eastern points to the Pacific coast had, for the time being, become unattractive to shipping companies, so that as long as these conditions existed there would be no effective water competition in the handling of such freight. A full hearing followed, in which the carriers and the coast cities sought to maintain the existing rates, while representatives of interior points insisted that these rates unjustly discriminated against interior points and that this discrimination should be removed. The result was that, by the orders of June 5 and July 13, 1916, now complained of, the

commission rescinded its orders authorizing the rates of 65 cents from Pittsburgh and 55 cents from Chicago and required that, effective September 1, 1916, the rates should be readjusted so as to allow only such discrimination as had been originally allowed. This, of course, could be accomplished either by increasing the rates to coast cities or reducing those to interior points. The carriers undertook to comply by adopting the former method and published a rate of 94 cents.

Up to this time the appellant had shown no interest in the matter, but on August 4, 1916, it sent to the Interstate Commerce Commission a telegram protesting against the increase upon the ground that the low rates had been made in competition with water rates and that no hearing had been had by the commission to determine whether the proposed increase rested upon changed conditions other than elimination of water competition. And on August 21, 1916, it filed its petition in this case in the District Court for the District of Oregon, in which one of the railroad companies was found.

In the meantime, on August 2, 1916, in view of the numerous protests, the commission had called an informal conference, which was held on August 14. And on August 29 the operation of the proposed increased rate was suspended until December 30, 1916, and later until the further order of the Commission. The rate of 94 cents complained of in the original petition did not go into effect at any time.

On November 14, 1916, the commission announced (Rec., p. 85):

It is understood that the Trans-Continental Lines propose to file tariffs effective upon statutory notice December 30, 1916, applicable upon the so-called "Schedule C" commodities named in the tariffs suspended in I. & S. Docket No. 909, which will increase the present rates to the Pacific coast ports a maximum of 10 cents per 100 pounds on carloads and 25 cents per 100 pounds on less-than-carload traffic, but no changes to intermountain points from eastern groups A to E, inclusive, are contemplated, hence the discriminations under the fourth section now existing between Pacific coast ports and intermountain cities will be diminished to the extent of the increases \* \* \* being 10 cents per 100 pounds on carloads and 25 cents per 100 pounds on less-than-carloads.

Tariffs were then published, to be effective December 30, 1916, under which the rate on iron and steel in carloads from Pittsburgh and other points east of the Missouri River to Seattle was 75 cents per 100 pounds.

On December 11, 1916, appellant repeated its protest to the commission by telegraph, and later filed its supplemental petition in this cause to enjoin the putting into effect of the rate of 75 cents.

It will thus be seen that the only action which the appellant attempted to take before the Commission was its two telegrams protesting against the rates fixed by the tariffs intended to become effective Sep-

tember 1 and December 30, respectively. Its real complaint is not that the commission had no power to require the readjustment of rates so as to remove the discrimination, previously approved, against intermediate points, but that because this discrimination had been allowed on account of water competition the railroad companies had no lawful right in readjusting their rates, in compliance with the orders of the commission, to increase the rate to points on the coast. Since, it is asserted, there had been no change in conditions except the elimination of water competition, the contention of the appellant is that the readjustment could be made only by decreasing the rates to intermediate points.

**STATUTE INVOLVED.**

Appellant's case is based on section 4 of the act to regulate commerce, which, as amended by the act of June 18, 1910 (36 Stat., 539, 547), reads as follows:

That it shall be unlawful for any common carrier subject to the provisions of this act to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as a through route than the aggregate of the intermediate rates subject to the provisions of this act; but this shall not be construed as authorizing any common carrier within the terms of this act to charge or receive as great

compensation for a shorter as for a longer distance: *Provided, however,* That upon application to the Interstate Commerce Commission such common carrier may in special cases, after investigation, be authorized by the commission to charge less for longer than for shorter distances for the transportation of passengers or property; and the commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section: *Provided further,* That no rates or charges lawfully existing at the time of the passage of this amendatory act shall be required to be changed by reason of the provisions of this section prior to the expiration of six months after the passage of this act, nor in any case where application shall have been filed before the commission, in accordance with the provisions of this section, until a determination of such application by the commission.

Whenever a carrier by railroad shall in competition with a water route or routes reduce the rates on the carriage of any species of freight to or from competitive points, it shall not be permitted to increase such rates unless after hearing by the Interstate Commerce Commission it shall be found that such proposed increase rests upon changed conditions other than the elimination of water competition.

#### ACTION OF THE COURT BELOW.

The District Court declined to grant the injunction sought and dismissed the petition and supplemental petition.

**GOVERNMENT'S CONTENTIONS.**

The Government contends:

First. That the controversy involved is one of which the courts have no jurisdiction, at least until it has been presented to and passed upon by the Interstate Commerce Commission, as provided in section 13.

Second. That the orders complained of were made upon the petition of the Nevada Railroad Commission and the Merchants' Association of Spokane, Wash., and hence if the courts have jurisdiction that jurisdiction is not in the District Court for Oregon but in the District Court for either the State of Nevada or the State of Washington.

Third. That there is no merit in appellant's attack upon either the orders of the commission or the rates effective December 30, 1916.

**BRIEF.****I.**

If the proposed rates are subject to attack by the appellant, such attack in the first instance must be made before the Interstate Commerce Commission by a petition under section 13 of the act to regulate commerce. No such action having been taken by the appellant, the courts are without jurisdiction of the controversy. (*United States v. Merchants & Manufacturers Traffic Association*, 242 U. S. 178, 188; *Texas & Pacific Ry. Co. v. American Tie & Timber Co.*, 234 U. S. 138, 146.)



## II.

The orders of the Interstate Commerce Commission sought to be set aside were made upon the petition of a merchants' association located in the State of Washington and a railroad commission located in the State of Nevada. If, therefore, the controversy is one of which the courts have jurisdiction the suit could be maintained only in the District Court for the State of Washington or the State of Nevada, and the District Court for the State of Oregon was without jurisdiction. (38 Stat., c. 32, p. 219; *Illinois Central R. R. Co. v. Public Utilities Commission*, 245 U. S. 493.)

## III.

The orders authorizing a rate of 65 cents which were attempted to be rescinded by the orders attacked in this case were only permissive and not mandatory, hence it is immaterial whether the rescinding orders ever took effect or not.

## IV.

The rescinding orders complained of were not based upon the fact that water competition had been eliminated but only upon the fact that changed world conditions had made such competition less effective.

## V.

When the act to regulate commerce as amended by the act of 1910 is considered as a whole, it is obvious that it prohibits an increase in rates reduced in competition with water routes only when the elimination

of water competition has been the result of putting into effect low rail rates and when such low rates have been put into effect by the railroads without authority.

### ARGUMENT.

#### I.

**The controversy is one over which the Interstate Commerce Commission and not the courts primarily has jurisdiction.**

It must be remembered that when these matters were pending before the Interstate Commerce Commission the appellant did not appear to object to the orders that were made. On the contrary, all it did was to protest by telegraph against tariffs which were proposed by the railroad company as complying with the orders of the commission. It is true that if the tariff published was not lawful and was unjust and worked to the injury of the appellant it had its remedy, but that remedy was not to appeal in the first instance to the courts. The act of Congress expressly provides a remedy by a proper proceeding before the commission itself. Until the appellant's claim has been presented to and passed upon by the commission the courts have no jurisdiction. Speaking on this subject in the case of *United States v. Merchants & Manufacturers Traffic Association* (242 U. S., 178, 188), Mr. Justice Brandeis said:

While it is proper and customary for communities or shippers interested to participate in hearings held, there is no provision for

notice to them. They are not bound by the order entered; at least in the absence of such participation. And if the rates made by tariffs filed under the authority granted seem to them unreasonable, or unjustly discriminatory, sections 13 and 15 afford ample remedy. Respondents contend that, after the amended order was entered and the tariffs filed, they did apply to the commission for relief "but were denied the right of a hearing" and that "their protest and demand were ignored and denied." What they did was to petition for a "rehearing" in the proceedings under the fourth section, to which they now say they were not parties, instead of applying for redress under section 13, as they had a legal right to do. They mistook their remedy. To permit communities or shippers to seek redress for such grievances in the courts would invade and often nullify the administrative authority vested in the Commission; and, as this case illustrates, the attempt of the court to remove some alleged unjust discriminations might result in creating infinitely more. The decree of the district court cancels the amended order and the tariff only so far as it concerns the four complaining cities and thereby discriminates perhaps most unjustly in their favor as against the other 181 interior cities.

The language used by appellant in presenting its case to the District Court is almost a paraphrase of the language just quoted. It merely protested against the proposed rates going into effect upon the ground that no hearing had been had to determine

whether the increases were justified by other changes in conditions than the elimination of water competition. It did not, as it might have done, file a petition under section 13 and have the commission determine whether or not the proposed method of complying with its orders was lawful. Not having done this, the case just cited is conclusive to the effect that the courts had no jurisdiction to grant appellant the relief it sought. And even before that case was decided it was thoroughly settled that the primary jurisdiction to pass upon all such questions was in the commission and not in the courts. (*Texas & Pacific Railway Co. v. American Tie & Timber Co.*, 234 U. S. 138, 146.)

**District court in Oregon without jurisdiction.**

But if it can be said that appellant's petition presented a controversy of which the courts could take jurisdiction, the suit was brought in the wrong court.

The urgent deficiencies act of October 22, 1913 (38 Stat., c. 32, p. 219), provides:

The venue of any suit hereafter brought to enforce, suspend, or set aside, in whole or in part, any order of the Interstate Commerce Commission shall be in the judicial district wherein is the residence of the party or any of the parties upon whose petition the order was made \* \* \*.

By this statute the United States consented to be sued, but only in the district designated in the language quoted, and it can not be sued in any other

jurisdiction. (*Illinois Central R. R. Co. v. Public Utilities Commission*, 245 U. S. 493.)

In the present case the petition states that the suit is brought to set aside the orders of the commission entered on June 5 and July 13, 1916. The case clearly comes, therefore, within the statute just quoted. The orders referred to, however, were not made upon the petition of any carrier but upon the petition of a merchants' association located in the State of Washington and a railroad commission located in the State of Nevada. The controversy was, in fact, one between these petitioners and those interested in maintaining low rates to points on the coast. Furthermore, in that controversy the carriers were all ranged on the side of the coast cities. Under the express terms of the act, any person seeking to attack these orders in the court was bound to go to the jurisdiction in which one of the petitioners was located. We have already seen that, in so far as this is a suit which merely complains of the manner in which the carriers have complied with an order of the commission, the courts are without jurisdiction, at least until further action is taken before the commission. If the case be treated as one seeking to set aside an order of the Interstate Commerce Commission, and if it be assumed that a question is thus presented of which the courts have jurisdiction, it follows that suit must have been brought in one of the courts in which the United States had consented to be sued. In any view of the case, therefore, the Government's motion to dismiss because the court in Oregon had no jurisdiction should have been sustained.

## II.

**The case upon its merits.**

If for any reason the court can properly consider this case upon its merits, the judgment of the District Court was clearly correct.

Appellant's theory is (1) that the carriers could not lawfully increase the 65-cent rate until the commission had rescinded its order authorizing that rate, and (2) that the rate having been reduced to 65 cents in competition with water routes it could not, under the circumstances, be increased even under authority granted by the commission. Neither contention is sound.

**The order authorizing the rate of 65 cents was not mandatory, but only permissive, and hence no order rescinding it was necessary to authorize an increase.**

Much of appellant's brief is devoted to showing that the rescinding orders of June 5 and July 13, 1916, have never, in fact, become effective. The argument, therefore, is that the rates which afterwards became effective on December 30, 1916, were unlawful because the commission had not rescinded the order authorizing the 65-cent rate. The claim seems to be that, until the rescission of that order, appellant is entitled as a matter of right to the rate of 65 cents. But this is based on an entire misconception of the order. On account of ocean competition, the commission had originally authorized lower rates to coast cities than to intermediate points. Relief from the fourth section had thus been granted within certain limits fixed

by the order of the commission. Undoubtedly, this was done for the purpose of enabling the carriers to compete with water transportation. Later the railroad companies applied for further relief, representing that the opening of the Panama Canal had so reduced the cost of ocean transportation from coast to coast that the rail rates previously authorized to coast cities were not low enough to enable the railroads to compete for a fair share of the freight. There was a full hearing, at which the claims and interests of the coast cities, the interior points, the steamship lines, and the railroads were presented.

Upon consideration of all the facts shown, the commission granted further relief by *authorizing* the railroads to fix their rates to the coast cities from Chicago and points grouped with it, and Pittsburgh and points grouped with it, as low as 55 cents and 65 cents, respectively. It must be remembered, however, that, in authorizing the discrimination originally allowed and also in authorizing this further discrimination, the orders of the commission were not mandatory. They did not require, but only permitted, the railroads to discriminate in favor of the coast cities to the extent indicated. Indeed, the commission had no power to require this discrimination. The law had provided that no such discrimination should be made by the carriers without the permission of the commission. If discrimination was to be allowed, the question for the commission was not what the precise rate should be but to what extent the ocean competition would justify dis-

crimination if the railroads found it necessary to discriminate at all. It follows that after the commission had fixed the limit to which discrimination could go, the discretion was still with the carriers to determine whether they would go to the full extent allowed or only partially take advantage of the authority granted or whether they would take advantage of it at all. It follows that, after the original order had been made, if the carriers had found that they could compete with ocean transportation by making rates to the coast cities no lower than those to intermediate points they were at liberty to do so; and even after they had acted on the authority granted by putting into effect the 80-cent rate they could, without new authority from the commission, have abandoned that rate by publishing a new and higher rate. And so when the special authority to fix a rate as low as 65 cents had been obtained, they were free to adopt that rate or not as they might see fit or find necessary. And having adopted it, they were likewise free, so far as the commission was concerned, to abandon it and publish a higher rate.

If the rescinding orders of June 5 and July 13, 1916, became effective, the only result would be that the carriers would no longer be authorized to make the rates of 55 cents and 65 cents, respectively, but would be required to readjust their rates so that the discrimination in favor of the coast cities would not be greater than had been originally allowed by the commission. When these rescinding orders were



made, therefore, the railroads, assuming that when they should go into effect on September 1, 1916, the 55-cent and 65-cent rates would no longer be lawful, prepared to readjust their tariffs so as to make their rates lawful. As shown above, they were not bound to grant to the coast cities the full amount of discrimination authorized by the original order, and apparently they decided that they would not do so and published a rate of 94 cents. This, however, was attacked, suspended, and did not go into effect.

The attack on the proposed rate was made by the Merchants Association of Spokane, Wash. And on October 17, 1916, the commission made an order setting the matter for hearing before an examiner. (Rec., pp. 81-82.) In this situation, the carriers abandoned the 94-cent rate and announced their purpose of publishing a 75-cent rate which would comply with the orders made by the commission previous to those which authorized the reduction to 65 cents. The commission accordingly granted authority to cancel the proposed 94-cent rate and also canceled the hearings before the examiner which it had previously ordered. Since the orders authorizing the 65-cent rate were not mandatory, the carriers were doing exactly what they had a right to do, whether the rescinding orders of June 5 and July 13, 1916, were effective or not. If the proposed 75-cent rate was for any reason illegal, it was subject to attack before the commission itself in the way provided by law. The appellant, however, has not seen fit to follow this course.

The proposed 75-cent rate was within the limitation within which the orders previous to the rescinded orders above mentioned allowed discrimination between coast cities and intermediate points. It is, therefore, within the relief from the fourth section which the commission had permitted. Since, under the orders which the commission attempted to rescind, the carriers were not bound to reduce the rate to 65 cents they were not, so far as the orders made by the commission are concerned, bound to maintain so low a rate after it was once put into effect. It follows that the mere fact that after having put a rate into effect the carriers have raised it can not furnish ground of complaint.

**Increase not prohibited by statute.**

Apparently, appellant rests its whole case upon the proposition that the rates having been once reduced in competition with water transportation could not be lawfully increased, the contention being based on this language in the amendatory act of June 18, 1910:

Whenever a carrier by railroad shall in competition with a water route or routes reduce the rates on the carriage of any species of freight to or from competitive points, it shall not be permitted to increase such rates unless after hearing by the Interstate Commerce Commission it shall be found that such proposed increase rests upon changed conditions other than the elimination of water competition.

The contention is that the opinions and orders of the Interstate Commerce Commission show that its action in abrogating the authority to charge the rates of 55 cents and 65 cents was based alone on the fact that water competition had been eliminated.

Undoubtedly there was a full hearing before the commission, and all the circumstances and surrounding conditions were considered at the time the rescinding orders were made. But it is a mistake to say that the commission found that water competition had been eliminated. It merely found that general conditions were such that competition by ocean had temporarily ceased to be an effective element in controlling freight rates. It was expressly found that this interruption or suspension of the effectiveness of water competition was only temporary and that such competition was certain to be resumed in an effective manner when the general prevailing conditions should change. The commission found that partly on account of the temporary interruption of traffic through the Panama Canal, but mainly because of the unprecedentedly high rates which by reason of war conditions were being offered for the transportation of many kinds of ocean freight, the two principal steamship companies operating between the Atlantic and Pacific coasts had, for the time being, withdrawn their ships from coast to coast business and chartered many of them for other purposes, and the commission said:

The prices obtained for the use of these ships, whether by the month or by the voyage, were exceptionally high. So long as such rates

can be obtained for ocean service between the United States and foreign countries there is no doubt that the coast to coast business will be unattractive to steamship lines at the rates now obtainable. Both of these companies announced their intention ultimately to return to this service, but stated that such return was unlikely before the end of the year 1916, and that the time of such return depended in part upon the measure of the rates they would be able to secure for this service in competition with the rail lines. The result of all the evidence offered was to show that there is not at this time any effective water competition between the two coasts and that there is little likelihood of any material competition by water during the present calendar year, irrespective of the action the commission may take with respect to these petitions. (Rec., p. 29.)

And after showing that the 55-cent and 65-cent rates had been permitted after a full consideration of the conditions then existing, the commission said:

The war and an unparalleled rise in prices for ocean transportation have so changed the situation as to transform a relation of rates which was justified when established to one that is now unjustly discriminatory against intermediate points. (Rec., p. 30.)

In substance, then, it was the general conditions brought about by the war and their effect upon water freight rates that made the rail rates previously established unduly and unjustly discriminatory.

The purpose of Congress in enacting the amendment now under consideration was obviously to prevent railroads from destroying water competition by putting into effect ruinously low rates and then, after thus eliminating the water competition, raising the rates. The preservation of water competition was probably the chief object in view. This amendment was intended to take away from the railroads the temptation to destroy water competition, since they could scarcely be expected to put into effect ruinous rates for this destructive purpose if they could not afterwards raise such rates to a paying basis. That this was the main concern of Congress is perfectly clear from the debates, which have been so fully referred to in the brief filed on behalf of the Interstate Commerce Commission as to make any further mention of them unnecessary.

The contention of the appellant is that if rates are reduced on account of water competition they can never be raised after the water competition has by any means been eliminated unless there are changes in other conditions. It is scarcely conceivable that Congress could have intended to lay down so hard and fast a rule; but if such an intention can be inferred from the act, it would not sustain appellant's contention in this case. In the first place, as has been seen, water competition has not been eliminated. Its effectiveness has only been temporarily suspended and interrupted. Conditions have arisen under which those engaged in water transportation can obtain such high rates as to make unattractive the business

that would compete with these railroads. The potential competition still exists. It may become active at any time. Doubtless, water transportation from coast to coast can now be obtained if the shipper is willing to compete as to rates with the prevailing rates for transportation between this country and foreign countries. It can not therefore be said that water competition has been eliminated within the meaning of the act of Congress. Giving to that act the most literal construction, it does not prohibit the raising of rail rates as long as water competition, either potential or active, exists, if by reason of an increase in water rates the lower rates previously charged by the railroads have become unnecessary to maintain competition. The changed conditions, therefore, which rendered it proper that the rescinding orders should be made did not consist of the elimination of water competition but did consist of the unprecedented increase in water rates. It would be monstrous to say that a certain discrimination against interior points, which had been permitted in order that the railroads could compete with the then prevailing water rates, should not be removed when, by reason of the increase in water rates, such discrimination had become unnecessary.

This section of the act, of course, must be read in connection with and as a part of the entire act. The primary purpose of the entire legislation was to prevent undue and unjust discrimination. The only thing which can justify a discrimination in favor of the coast cities is that such discrimination is neces-

sary to meet existing competition. Lower rates than are necessary to meet such competition necessarily constitute an unjust discrimination against intermediate points. Originally ocean rates from coast to coast were such that the low rate allowed was necessary in order for the railroads to secure a fair share of the traffic to coast cities. Later, the conditions were changed. This change was brought about by the opening of the Panama Canal and the consequent decrease in ocean rates. To meet this the commission very properly allowed a further discrimination against interior points. Still later, the conditions again changed. The unexpected situation of the whole world and the unheard of demand for ocean shipping caused an immense increase in all ocean rates. Under these rates, ocean traffic from coast to coast could not compete with rail traffic at the existing low rates which had been permitted. So long as these conditions as to ocean rates prevailed, there was no excuse for maintaining the very low rail rates to the coast. To maintain them was an undue and unjustifiable discrimination against interior points, to prevent which this legislation had been enacted. In short, the record shows conclusively that the withdrawing of the extreme measure of relief from the fourth section which had been previously granted was based not upon the elimination of water competition, but upon the changed world conditions which had temporarily rendered that competition ineffective. The raising of the coast rates, therefore, can not in any view be

regarded as a violation of the language of the act quoted above, even giving it the most literal construction.

The contentions that the act is not to be given so literal a construction but that at most it only prohibits an increase in rates when the elimination of water competition has been the result of putting into effect low rail rates, and when such low rates have been put into effect by the railroads without authority from the commission, have been so fully and conclusively presented in the brief filed on behalf of the Interstate Commerce Commission that it is not deemed necessary to add anything to what has been there said.

### III.

In conclusion it is respectfully submitted that the decree of the District Court is manifestly correct and should be affirmed.

WILLIAM L. FRIERSON,  
*Assistant Attorney General.*

MARCH, 1919.





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MAR 7 1919  
JAMES D. MAHER,  
CLERK

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# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. 215.

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SKINNER & EDDY CORPORATION,

*Appellant,*

vs.

THE UNITED STATES OF AMERICA,  
THE INTERSTATE COMMERCE COMMISSION,  
BALTIMORE & OHIO RAILROAD COMPANY,  
and others,

*Appellees.*

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## BRIEF AND ARGUMENT FOR CARRIER APPELLEES.

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Texarkana Freight Bureau vs. S. L. I. M. & S., 28 I. C. C. 569. ....	17, 18, 32
United States vs. Merchants & Manufacturers Traffic Association, 242 U. S. 178 (Sacramento case) .....	7, 19, 39, 45, 47

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. 215.

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SKINNER & EDDY CORPORATION,

*Appellant,*

vs.

THE UNITED STATES OF AMERICA,  
THE INTERSTATE COMMERCE COMMISSION,  
BALTIMORE & OHIO RAILROAD COMPANY,  
and others,

*Appellees.*

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## BRIEF AND ARGUMENT FOR CARRIER APPELLEES.

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### STATEMENT.

A re-statement of the case is believed necessary by the carrier appellees, hereinafter called the carriers, to clarify the questions at issue and the facts of record.

Appellant's main contention is that the last paragraph of Section 4 of the Act to Regulate Commerce, as amended, which reads:

"Whenever a carrier, by railroad, shall, in competition with a water route or routes, reduce the rates on the carriage of any species of freight to or from competitive points, it shall not be permitted to increase such rates unless after hearing by the Interstate Commerce Commission it shall be found that such proposed increase rests upon changed conditions other than the elimination of water competition."

applies even where, as here, the rail rates were originally reduced with the Commission's permission granted on application of the carriers under the proviso of the first paragraph of that section, and that the Commission has made no finding that the increases here attacked rested on changed conditions, other than the elimination of water competition.

The sole argument which the appellant advances for such an application of the last paragraph of Section 4 is that this is the literal wording of that paragraph.

The carriers on the contrary submit

I. That it is at least doubtful whether even the literal wording of the last paragraph of Section 4 makes it applicable where, as here, the rail rates were originally reduced with the Commission's permission, since it would seem that the language of that paragraph,

"Whenever a carrier, by railroad, shall \* \* \*  
reduce the rates"

contemplates the sole, independent and unrestrained action of the carrier, and is not the literal equivalent of a reduction made only through the joint action of the railroad and the Commission.



II. That the literal wording of the entire Fourth Section, including the proviso of the first paragraph that

"The Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation *of this section*,"

as distinguished from the literal wording of the last paragraph alone, would permit the Commission to relieve the carrier from the operation of the whole, or any part, of the Fourth Section, and, therefore, from the operation of the last paragraph, as well as from the operation of the long and short haul provisions of the first paragraph, from which, admittedly, the carrier may be relieved.

III. That one of the principal purposes sought to be effected by the amended Fourth Section was the protection of water competition from being driven out of existence by the *temporary* reduction of the rail rates to a point so low that the water carriers could not exist.

IV. That, construing the Fourth Section as a whole and with reference to this purpose, the last paragraph of the Fourth Section can have no application where, as here, a rail carrier, in competition with a water carrier, *has originally reduced its rates with the permission of the Interstate Commerce Commission* granted upon the application of the carrier under the proviso of the first paragraph of Section 4.

(A) Because, so construed, water competition is effectively protected,

(1) *Whenever the rail carrier applies to the Commission for permission to reduce its rates in compe-*

tion with a water carrier, by enabling the Commission to control the extent to which the carrier shall go in meeting such competition.

(2) *Whenever the rail carrier reduces such rates without applying to the Commission for permission, by deterring the rail carrier from making rates so low as to destroy water competition through depriving such reductions of their essential temporary character by the penalty of having to maintain the reduced rates at both competitive and intermediate points after water competition is destroyed.*

(B) Because to construe the last paragraph of Section 4 as applying where the rates were originally reduced with the Commission's permission would be inconsistent with other provisions of Section 4; would needlessly penalize the carrier and, under certain conditions, would render the destruction of water competition inevitable and irremedial.

(1) Would be inconsistent with the proviso of the first paragraph of Section 4 to the effect that

"The Commission may from time to time prescribe the extent to which the carrier may be relieved from the operation of this section."

which, as the Commission notes, 40 I. C. C. 35, Page 41,

"seems to contemplate a certain flexibility in the rates at competitive points varying with the degree of competition there found, in connection with which rates relief may be afforded according to the degree and extent of the competition."

(2) Would needlessly penalize the carrier, since the Commission can and does effectively protect water competition whenever a carrier applies, under the proviso of the first paragraph, for permission to meet such competition without maintaining the competitive rate at intermediate points.

(3) Would render the destruction of water competition inevitable and irremediable if, through error, the Commission might permit the carrier in the first instance to make a rate so low as to drive such competition out of existence.

V. Even if the last paragraph of Section 4 applies where, as here, the rail rates have been reduced with the Commission's permission, the Commission has here found that the increase attacked rests upon changed conditions other than the elimination of water competition and, in effect, that there has been, as to these rates, no elimination of water competition within the meaning of the last paragraph of Section 4. Furthermore, the Commission's findings were made after full hearing, and though it is not clear of record whether or not the appellant actually participated in this hearing, this fact is immaterial as under the decision of this court, *United States vs. Merchants, etc. Association*, 242 U. S. 178, p. 188, the appellant was not a necessary party thereto and was legally represented by the Commission.

It should here be noted that this brief will not discuss the questions raised by the Interstate Commerce Commission as to the jurisdiction of the District Court over the

subject matter of this suit (60)\*. Neither will consideration here be given to the question raised by certain of the defendants as to the proper venue of the petition (56, 57, 59, 66, 100). It is understood that these questions will be covered in the brief to be filed for the Government.

There are, however, two minor contentions of the appellant which will be considered:

(a) The appellant's contention that the increased rates are unlawful because the Commission is alleged to have exceeded its jurisdiction in attempting by its Order of April 1, 1916, (25) to re-open Fourth Section No. 10336, in the absence of any application by the carriers for the re-opening of their original application. Fourth Section Application No. 10336 was the application upon which the carriers were originally permitted by the Commission's Fourth Section Order No. 5409 of March 1, 1916 (24) to reduce to sixty-five cents the then existing eighty cent rate on iron and steel articles from Pittsburgh to Seattle and other Pacific coast ports, and it is the validity of the increase of this sixty-five cent rate to seventy-five cents, effective December 30, 1916, that is attacked by the appellant in this proceeding.

(b) The appellant's contention that even if the Commission's Order re-opening Fourth Section Application 10336 was valid, the Commission's Order of June 5, 1916 (34) in the re-opened application, requiring the removal of discrimination against intermediate points by the maintenance of lower rates to the coast effective September 1,

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\*Figures in parenthesis refer to page of printed record.

1916, became *fuctus officio* after its effective date, and was not revived by the Commission's subsequent order of September 19, 1916 (79) in the same proceeding purporting to extend the effective date of its order of June 5 so as to become effective December 30th instead of September 1st. Likewise the appellant's contention that the Commission's order of November 13, 1916, in the same proceeding was nugatory on the same grounds.

These minor contentions of the appellant hardly call for serious discussion in their legal aspect, and will be better answered by a brief consideration of the facts of record as to the entry of the orders in question. A restatement of these facts is necessary, not because there has been any general misstatement of them by the appellant, but because the manner in which the appellant has stated the facts fails to make their real significance apparent in connection with the appellant's contentions.

The appellant in contending (a) that because the carriers did not apply for a re-opening of Fourth Section Application 10336, the Commission was without authority to re-open that application, either upon its own initiative or upon the petition of shippers at intermediate points, as was actually the case, ignores the dicta of Mr. Justice Brandeis in the Sacramento case, *United States v. Merchants & Manufacturers Traffic Association*, 242 U. S. 178. This dicta is ignored by the appellant although it immediately proceeds that portion of the same opinion which appellant quotes in another connection, pages 43 and 44 of its brief. In that case Mr. Justice Brandeis said, page 187:

*"It may be doubted whether application by the carrier is a prerequisite to the granting of relief. As was said in the Intermountain Cases, 234 U. S. 236,*

485, Section 4 vests in the Commission the 'primary instead of a reviewing function' to determine the propriety of a lesser rate for a longer distance; and Section 13 declares that the Commission 'shall have the same powers and authority to proceed with any inquiry instituted on its own motion as though it had been appealed to by complaint or petition under any of the provisions of this act, including the power to make and enforce any order or orders in the case, or relating to the matter or thing concerning which the inquiry is had, excepting orders for the payment of money.' Unless formal application be an indispensable prerequisite to the exercise by the Commission of the power granted by the Fourth Section, its absence or a defect in it could be waived; and it would be waived by the filing of tariffs under the order entered. For the order is permissive merely. The carrier is the only necessary party to the proceeding under Section 4. The Commission represents the public. While it is proper and customary for communities or shippers interested to participate in hearings held, there is no provision for notice to them. They are not bound by the order entered; at least in the absence of such participation, and if the rates made by the tariffs filed, under the authority granted, seem to them unreasonable or unjustly discriminatory, Sections 13 and 15 afford ample remedy."

It seems clear from the foregoing that even had no Fourth Section Application ever been filed by the carriers, the carriers alone would have had the right to question the Commission's authority, and could have waived that right. However this may be, it is clear that this Court must hold that where, as here, these carriers themselves filed with the Commission the application upon which the Commission originally permitted these rates to be reduced, the Commission, under the proviso of the first paragraph of the Fourth Section, retained authority

"from time to time to prescribe the extent to which such \* \* \* carrier (s) may be relieved from the operation of this section,"

and that such authority was not dependent upon any renewed application by the carrier, but, of necessity, might be exercised on the Commission's own initiative.

Appellant's contention (b) that the Commission's order of September 19, 1916 (79) in Fourth Section Application No. 10336 was *fuctus officio*, is equally without merit, when considered in connection with the facts under which it was entered. Indeed, it is obviously advanced only because of the appellant's own distrust of the point just disposed of.

The Commission's order of June 5, 1916 (34), in Fourth Section Application No. 10336 rescinds, effective September 1, 1916, its Fourth Section Order No. 5409 (24) of March 1, 1916, entered on that same application. As has already been stated, Fourth Section Order No. 5409 was the order by which, upon the carrier's Fourth Section Application No. 10336, the Commission permitted the reduction of the former 80 cent rate on iron and steel articles from Pittsburgh to Seattle and other Pacific coast ports to 65 cents. By its order of June 5, the Commission further required that, effective September 1, 1916, the rates on all schedule C commodities (which, as stated on Page 3 of the appellant's brief, included iron and steel articles), should be re-adjusted in accordance with the requirements of its Fourth Section Order No. 124 of April 30, 1915, as to commodities other than those listed under schedule C.

The Commission's Fourth Section Order No. 124 is not itself a part of the printed record in this case, but the report of it, 32 I. C. C. 611, is referred to in the Commis-

sion's order of June 5, 1916 (35). A reference to page 614 of that report shows that, except as to schedule C commodities, the Commission authorized

"the maintenance of higher rates to the intermediate points than to the coast on traffic originating in zones 2, 3 and 4, by 7, 15 and 25 per cent respectively."

Page 613 of that report shows that Pittsburgh is in zone 3. As stated, page 8 of the appellant's brief, the Commission's order of June 5, 1916, in Re-opened Fourth Section Order 10336 et al. did not require the carriers to increase the terminal rates and might have been complied with by a reduction of the rates to Spokane. The carriers, however, chose to comply with the Commission's order to remove the discrimination against the intermediate points by increasing the terminal rates. This they had a right to do (*St. Louis Southwestern Railway Company v. United States*, 245 U. S. 136, 145), unless prohibited by the last paragraph of Section 4 of the Act to Regulate Commerce. Whether they were so prohibited is the question at issue in this case.

The fact remains that the carriers elected to maintain the existing \$1.08 rate to Spokane, and, therefore, effective September 1, 1916, in Supplement 11 to Tariff 4-M published a rate of 94 cents to Seattle (40, 41, 42), the \$1.08 rate representing 15 per cent over the 94 cent rate, the relation prescribed by Fourth Section Order No. 124, as above quoted. In this connection it is here necessary to call attention to a misstatement of fact on page 7 of the appellant's brief. The appellant there says:

"By publishing on July 28, 1916, rates of 94 cents on iron and steel in carloads from Pittsburgh to Seattle and Spokane, the carriers complied with the order,



whose purpose thus was served, so far as those commodities were concerned."

This is incorrect, for, as has just been stated, the existing rate of \$1.08 was retained at Spokane while a rate of 94 cents was published to Seattle. This indeed appears from the appellant's own statement on page 6 of its brief that

"The proposed increased rates did not comply with the long and short haul rule of the Fourth Section, being lower to Seattle for example than to Spokane, a point directly intermediate."

It should here be stated that neither the alleged 94 cent rate to Spokane, referred to by the appellant, nor the \$1.08 rate herein referred to appears in the printed record. The \$1.08 rate, however, was contained in Supplement No. 11 to Tariff 4-M, to enjoin the taking effect of which the appellant filed its original petition (40, 41, 42).

The carriers, in response to the Commission's order of June 5, 1916, in Re-opened Fourth Section Application No. 10336, having undertaken to publish these increased rates to the coast and intermediate points, the appellant, by its original petition filed in the District Court August 21, 1916, sought to enjoin the taking effect of the increased rates. On August 29, 1916, the Interstate Commerce Commission, acting upon the protest of the appellant, among others, itself suspended the effective date of Tariff 4-M until December 30, 1916, by its order in I. & S. Docket 909 (62, 63) and thereupon the appellant obtained leave to withdraw, without prejudice, its original application for a restraining order (52). While the Commission made no order in I. & S. Docket No. 909 extending the effective date, September 1, 1916, of its order of June 5,

1916, in Re-opened Fourth Section Application No. 10336, it did make such an order on September 19, 1916 (79). This is the order which the appellant alleges is void because it claims the order of June 5, 1916, became *functus officio* on September 1, 1916, and could not be revived. The terms of the Commission's order of September 19, 1916, in Re-opened Fourth Section Application No. 10336 are the best refutation of the appellant's claim. After reciting that it had on August 29, 1916, in I. & S. Docket No. 909, suspended the rates published by the carriers to supersede the rates established by the Fourth Section Orders rescinded by the Commission's order of June 5, 1916, the order states (79) :

"And it further appearing, That the effect of the said order of suspension is to continue in force the rates established by the Fourth Section orders above enumerated until December 30, 1916, therefore,

It is ordered, that the order entered in the above entitled matter on June 5, 1916, as amended July 13, 1916, be, and the same is hereby further amended as of date of August 31, 1916, so as to become effective December 30, 1916, instead of September 1, 1916."

Whatever might have been the situation, had the Commission taken no action whatever prior to September 1, 1916, to extend the effective date of its order of June 5th, there can be no doubt that the Commission had the right on September 19, 1916, to make the merely formal order extending the effective date of its order of June 5th to December 30, 1916, since it had already on August 29th, by suspending, until December 30, 1916, the carriers' rates published under the order of June 5th, in effect likewise suspended the effective date of that order. If this is so, it is clear that the Commission's Order of November 13, 1916

(83) which is attacked by the appellant on the same grounds, and which again extended the effective date of the order of June 5, 1916, until further order of the Commission, was a valid order. In this connection it is here desired to state, however, that the carriers believe that prior at least to the amendment of August 9, 1917, to Section 15 of the Act to regulate commerce, 40 Stat. L. 270, the Commission's permission was not necessary to enable a rail carrier, which had reduced its rates in competition with a water carrier, to increase those rates, even though they had been originally reduced with the Commission's permission.

Since the carriers believe that the foregoing review of the facts in connection with the Commission's orders of June 5th and of September 19th and November 14th, 1916, respectively, fully establishes the validity of those orders, the carriers will submit the case as to those orders without further brief or argument.

Before proceeding to the brief and argument of the principal question at issue, i. e., the applicability of the last paragraph of Section 4 where the said rates have been reduced with the Commission's permission, there is one other statement of fact in the appellant's brief which it is desired to correct. On page 32 of that brief it is stated:

"But in the pending suit this precise question is in issue, and the carriers not only did not apply to the Commission by petition or otherwise to re-open Fourth Section Application No. 10336, *but opposed any change in their rates on iron and steel articles from Pittsburgh to Pacific coast ports.*"

The italicized portion of the above statement is only partially true. It is true to the extent that the carriers

were opposed to any decrease in the measure of Fourth Section relief, because of the temporary disappearance of water competition due to the attractiveness of European War traffic. The carriers, however, insisted, as shown by the Commission's report, 40 I. C. C. 35, pages 39-42, that if, on account of this temporary disappearance of water competition, they were not to be permitted to maintain lower rates to the Pacific coast than to intermediate points, they were entitled to correct the situation by increasing the rates to the Pacific coast rather than by reducing them at intermediate points. That portion of the Commission's decision cited so holds in response to the oral argument of counsel for the carriers to that effect.

## BRIEF.

## I.

IT IS AT LEAST DOUBTFUL WHETHER EVEN THE LITERAL WORDING OF THE LAST PARAGRAPH OF SECTION 4 MAKES IT APPLICABLE WHERE, AS HERE, THE RAIL RATES WERE ORIGINALLY REDUCED WITH THE COMMISSION'S PERMISSION, SINCE IT WOULD SEEM THAT THE LANGUAGE OF THAT PARAGRAPH,

"Whenever a carrier, by railroad, shall \* \* \*  
reduce the rates"

CONTEMPLATES THE SOLE, INDEPENDENT AND UNRESTRAINED ACTION OF THE CARRIER AND IS NOT THE LITERAL EQUIVALENT OF A REDUCTION MADE ONLY THROUGH THE JOINT ACTION OF THE RAILROAD AND THE COMMISSION.

36 Stat. L. 539.

## II.

THE LITERAL WORDING OF THE ENTIRE FOURTH SECTION, INCLUDING THE PROVISIO OF THE FIRST PARAGRAPH THAT

"The Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of *this section*",

AS DISTINGUISHED FROM THE LITERAL WORDING OF THE LAST PARAGRAPH ALONE, WOULD PERMIT THE COMMISSION TO RELIEVE THE CARRIER FROM THE OPERATION OF THE WHOLE OR ANY PART OF THE FOURTH SECTION, AND, THEREFORE, FROM THE OPERATION OF THE ENTIRE LAST PARAGRAPH, AS WELL AS FROM THE OPERATION OF THE LONG AND SHORT HAUL PROVISIONS OF THE FIRST PARAGRAPH FROM WHICH, ADMITTEDLY, THE CARRIER MAY BE RELIEVED.

## III.

ONE OF THE PRINCIPAL PURPOSES SOUGHT TO BE EFFECTED BY THE AMENDED FOURTH SECTION WAS THE PROTECTION OF WATER COMPETITION FROM THE DANGER OF BEING DRIVEN OUT OF EXISTENCE BY THE TEMPORARY REDUCTION OF THE RAIL RATES TO A POINT SO LOW THAT THE WATER CARRIERS COULD NOT EXIST.

Re Re-opening Fourth Section Applications, 40 I. C. C. 45, 40.

Railroad Commission of Nevada v. S. P. Co., 21 I. C. C. 329, pp. 345-362.

## IV.

THE LAST PARAGRAPH OF THE FOURTH SECTION, CONSTRUED IN CONNECTION WITH THE FOURTH SECTION AS A WHOLE AND WITH REFERENCE TO THE PURPOSE OF THAT SECTION, CAN HAVE NO APPLICATION WHERE, AS HERE, THE RAIL CARRIER HAS ORIGINALLY REDUCED ITS RATES IN COMPETITION WITH A WATER CARRIER WITH THE PERMISSION OF THE INTERSTATE COMMERCE COMMISSION, GRANTED UPON THE APPLICATION OF THE CARRIER UNDER THE PROVISIO OF THE FIRST PARAGRAPH OF SECTION 4.

Re Re-opening Fourth Section Applications, 40 I. C. C. 35, pp 39-42.

(A) Because so construed water competition is effectively protected

(1) *Whenever the rail carrier applies to the Commission for permission to reduce its rates in competition with a water carrier, by enabling the*

Commission to control the extent to which the carrier shall go in meeting such competition.

Re Re-opening Fourth Section Applications,  
40 I. C. C. 35, 40, 41.

Rates on Iron and Steel Articles, 38 I. C. C.  
237, pp. 238, 240.

Commodity Rates to Pacific Coast, 34 I. C. C.  
13, 17.

Texarkana Freight Bureau v. S. L. I. M. & S.,  
28 I. C. C. 569, 583.

(2) *Whenever the rail carrier reduces such rates without applying to the Commission for permission*, by deterring the rail carrier from making rates so low as to destroy water competition through depriving such reductions of their essential *temporary* character by the penalty of having to maintain the reduced rates at both competitive and intermediate points after water competition is destroyed.

40 I. C. C. 35, 40.

(B) Because to construe the last paragraph of Section 4 as applying where rates were originally reduced with the Commission's permission would be inconsistent with other provisions of Section 4; would needlessly penalize the carrier; and, under certain conditions, would render the destruction of water competition inevitable and irremediable.

(1) Would be inconsistent with the proviso of the first paragraph of Section 4 to the effect that

"The Commission may from time to time prescribe the extent to which the carrier may be relieved from the operation of this section",

which, as the Commission notes, 40 I. C. C. 35, p. 41,

"seems to contemplate a certain flexibility in

the rates at competitive points varying with the degree of competition there found, in connection with which rates relief may be afforded according to the degree and extent of the competition."

(2) Would needlessly penalize the carrier, since the Commission can and does effectively protect water competition whenever a carrier applies, under the proviso of the first paragraph, for permission to meet such competition without maintaining the competitive rate at intermediate points.

Re Re-opening Fourth Section Applications, 40 I. C. C. 35, p. 40.

Rates on Iron and Steel Articles, 38 I. C. C. 237, pp. 238, 240.

Commodity Rates to Pacific Coast, 34 I. C. C. 13, p. 17.

Texarkana Freight Bureau v. S. L. I. M. & S., 28 I. C. C. 569, 583.

(3) Would render the destruction of water competition inevitable and irremediable if, through error, the Commission might permit the carrier in the first instance to make a rate so low as to drive such competition out of existence.



## V.

EVEN IF THE LAST PARAGRAPH OF SECTION 4 APPLIES WHERE, AS HERE, THE RAIL RATES HAVE BEEN REDUCED WITH THE COMMISSION'S PERMISSION, THE COMMISSION HAS HERE FOUND THAT THE INCREASE ATTACKED RESTS UPON CHANGED CONDITIONS OTHER THAN THE ELIMINATION OF WATER COMPETITION AND, IN EFFECT, THAT THERE HAS BEEN, AS TO THESE RATES, NO ELIMINATION OF WATER COMPETITION WITHIN THE MEANING OF THE LAST PARAGRAPH OF SECTION 4.

FURTHERMORE, THE COMMISSION'S FINDINGS WERE MADE AFTER FULL HEARING, AND THOUGH IT IS NOT CLEAR OF RECORD WHETHER OR NOT THE APPELLANT ACTUALLY PARTICIPATED IN THIS HEARING, THIS FACT IS IMMATERIAL AS UNDER THE DECISION OF THIS COURT, UNITED STATES VS. MERCHANTS, ETC. ASSOCIATION, 242 U. S. 178, P. 188, THE APPELLANT WAS NOT A NECESSARY PARTY THERETO AND WAS LEGALLY REPRESENTED BY THE COMMISSION.

Re Re-opened Fourth Section Applications, 40 I. C. C. 35-42.

Insulated Wire & Cable Co. v. Chicago & Northwestern Ry. Co., <sup>26</sup>20 I. C. C. 415, P. 416.

## VI.

THE COMMISSION HAD JURISDICTION TO MAKE ITS ORDER OF APRIL 1, 1916 (25) RE OPENING FOURTH SECTION APPLICATION No. 10336.

Sacramento Case, U. S. v. Merchants & Manufacturers Traffic Association, 242 U. S. 178, 187.

NOTE: This question is fully considered in the statement of the case of the carriers herein and will not be further argued.

## VII.

THE COMMISSION'S ORDER IN FOURTH SECTION APPLICATION No. 10336 OF JUNE 5, 1916, (34) DID NOT BECOME FUNCTUS OFFICIO AFTER ITS ORIGINAL EFFECTIVE DATE, SEPTEMBER 1, 1916, BUT WAS LEGALLY EXTENDED BY THE COMMISSION'S SUBSEQUENT ORDERS IN THE SAME APPLICATION OF SEPTEMBER 19, 1916 (79) AND NOVEMBER 13, 1916, (83), AND AFFORDED THE CARRIERS PERMISSION FOR THE INCREASE OF THE RATES HERE ATTACKED, IF SUCH PERMISSION WAS NEEDED, WHICH THE CARRIERS DENY.

NOTE: This question is fully considered in the statement of the case of the carriers herein and will not be further argued.

## ARGUMENT.

### I.

IT IS AT LEAST DOUBTFUL WHETHER EVEN THE LITERAL WORDING OF THE LAST PARAGRAPH OF SECTION 4 MAKES IT APPLICABLE WHERE, AS HERE, THE RAIL RATES WERE ORIGINALLY REDUCED WITH THE COMMISSION'S PERMISSION, SINCE IT WOULD SEEM THAT THE LANGUAGE OF THAT PARAGRAPH,

"Whenever a carrier, by railroad, shall \* \* \*  
reduce the rates"

CONTEMPLATES THE SOLE, INDEPENDENT AND UNRESTRAINED ACTION OF THE CARRIER AND IS NOT THE LITERAL EQUIVALENT OF A REDUCTION MADE ONLY THROUGH THE JOINT ACTION OF THE RAILROAD AND THE COMMISSION.

The sole argument which the appellant can advance for construing the last paragraph of Section 4 as applying even where, as here, the rail rates were originally reduced with the Commission's permission, is that the literal wording of that paragraph makes it so applicable. The carriers will subsequently discuss certain considerations in connection with the purpose sought to be affected by this paragraph which preclude the possibility of construing it to apply in such a case. But entirely aside from the purpose of the paragraph and from its construction, literal or otherwise, in connection with the remainder of the section, it is at least doubtful whether, standing alone, the literal wording of the paragraph would justify the application which the appellant claims for it.

On pages 35 to 39 of its brief the appellant discusses the form which it contends the paragraph should have taken, and certain language which the appellant claims would have to be read into it, to make it inapplicable where the rate is reduced with the Commission's permission. As a matter of fact, to make the paragraph unmistakably applicable in such a case the wording, which now reads:

"Whenever a carrier, by railroad, shall, in competition with a water route or routes, reduce the rates on the carriage of any species of freight," etc.,

would have to be changed so as to read:

"Whenever a carrier, by railroad, shall, in competition with a water route or routes, *with or without the permission of the Commission*, reduce the rates," etc.

Certainly the appellant has not undertaken to demonstrate that the language actually used is the literal equivalent of the language which must have been used to make the paragraph clearly applicable whether the rates were reduced with or without the Commission's permission. Even, however, if the plaintiff is correct that, literally read, the last paragraph standing alone, would apply even where the rail rates were reduced with the Commission's permission, that fact would be of little importance. It is a canon of statutory construction too well established to require citation, that the meaning of the wording of any part of a statute must be determined with reference to the wording of the statute as a whole and with reference to the purpose sought to be effected by the statute. Applying these tests to the appellant's contention, it is apparent that it is, in the first place, opposed to the literal reading of the proviso of the first paragraph of Section 4, and,

in the next place, repugnant to the purpose which that section sought to effect. Both these points will be further developed.

## II.

THE LITERAL WORDING OF THE ENTIRE FOURTH SECTION, INCLUDING THE PROVISO OF THE FIRST PARAGRAPH THAT

"The Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of *this section*",

AS DISTINGUISHED FROM THE LITERAL WORDING OF THE LAST PARAGRAPH ALONE, WOULD PERMIT THE COMMISSION TO RELIEVE THE CARRIER FROM THE OPERATION OF THE WHOLE OR ANY PART OF THE FOURTH SECTION, AND, THEREFORE, FROM THE OPERATION OF THE ENTIRE LAST PARAGRAPH, AS WELL AS FROM THE OPERATION OF THE LONG AND SHORT HAUL PROVISIONS OF THE FIRST PARAGRAPH FROM WHICH, ADMITTEDLY, THE CARRIER MAY BE RELIEVED.

The question whether the proviso of the first paragraph of the Fourth Section applies to the last paragraph of that section has not, so far as the carriers are aware, been considered either by the Commission or this Court. That it literally applies seems clear.

The Fourth Section itself consists of two prohibitions and two provisos, of which the one above quoted is the first. It is true that the first paragraph contains both provisos and only one of the prohibitions, i. e., the so-called long and short haul clause, and that the prohibition here in question is not mentioned in the first paragraph, but is found solely in the last. Moreover, it may be ad-

mitted that the second proviso of the first paragraph has obviously no application, literal or otherwise, to the second paragraph. Just as clearly, however, the first proviso is not limited to the first paragraph, but is as broad as the section and applies literally to the second paragraph.

Therefore, while it is at least doubtful whether even standing alone, the literal wording of the last paragraph of Section 4 makes it applicable where the rail rates were originally reduced with the Commission's permission, it cannot well be denied that, if that wording does so apply, the proviso of the first paragraph literally authorizes the Commission to relieve the carrier from the prohibition of the second paragraph.

Moreover, as will be further noted when more extended consideration is given to the admitted purpose of the Fourth Section, i. e., the protection of water competition, it will be seen that if the last paragraph be construed to literally apply, even, where the rail rates were reduced with the <sup>Commission's</sup> carrier's permission, a literal application must likewise be made of the first proviso of the first paragraph. This is necessary in order to prevent the permanent destruction of water competition should the Commission, in error, permit the rail rates to be reduced to a point so low as to drive such competition out of existence. If the last paragraph applies in such a case, both the Commission and the carriers would be powerless to restore such competition, unless the Commission, under the first proviso of the first paragraph, could relieve the carriers from the operation of the last paragraph. This would be so, since the carriers, in the absence of other changed conditions, could do no more than to show that the reduced

rates were unreasonable or confiscatory, and those facts alone would not justify the increase of the rates, since those facts must have existed at the time the rates were reduced. This would be to insure, in the absence of a further action by Congress, not only the permanent destruction of water competition, but, solely on account of the mistake of the Commission, the ultimate destruction of the rail carriers themselves, since the rail carriers would not only have to maintain the unreasonably low rates at the competitive points, but would now be compelled to apply them at intermediate points as well, because, with the elimination of water competition, the discrimination against intermediate points could no longer be justified.

The carriers submit, therefore, that the literal wording of the first proviso of the first paragraph of Section 4 permits the Commission to relieve the rail carriers from the prohibition of the last paragraph of that section and must be so construed, if the last paragraph be held to literally apply where the rail rates were originally reduced with the Commission's permission, in order to permit the effective protection of water competition.

### III.

ONE OF THE PRINCIPAL PURPOSES SOUGHT TO BE EFFECTED BY THE AMENDED FOURTH SECTION WAS THE PROTECTION OF WATER COMPETITION FROM THE DANGER OF BEING DRIVEN OUT OF EXISTENCE BY THE TEMPORARY REDUCTION OF THE RAIL RATES TO A POINT SO LOW THAT THE WATER CARRIERS COULD NOT EXIST.

The history of the amendment of the Fourth Section in 1910 with reference to the correction of the evils resulting

from the suppression of water competition through the uncontrolled competition of the rail carriers, is considered at length in Commissioner Lane's opinion in *Railroad Commission of Nevada v. S. P. Co.*, 21 I. C. C. 329, pp. 346-362. It is there shown that the trans-continental rail carriers first destroyed the competition of the clipper ships, and, subsequently, of the San Francisco Merchants Steamship Line, by reducing the rates to what Commissioner Lane terms "absurdly low figures," and then, as soon as the water competition was eliminated, restored the previously high rail rates, and, in some instances, actually increased them. That it was the purpose of the last paragraph of Section 4 to prevent this very thing appears from Commissioner Lane's opinion as well as from the opinion of this Commission in *Re Re-opening Fourth Section Applications No. 10336, et al.*, 40 I. C. C. 35, p. 40. In this connection it is important to note that the chief weapon in the hands of the rail carriers in eliminating water competition was the power of the rail carriers, prior to the amendment of Section 4, to make the reduction of rail rates *purely temporary*. It was essential that a rail carrier should be able to make such a reduction purely temporary because, while a rail carrier could afford to risk a *temporary* reduction of its rates to a point so low that even the water carriers, with their much cheaper costs of service could not exist, the rail carrier could not afford such a *permanent* reduction to such a basis, since its maintenance would ultimately result in destroying the rail carrier itself.

The protection of water competition, therefore, being the clear purpose of the amended Fourth Section, that



section, including the last paragraph, must be construed so as to effect this purpose and so as not to defeat it. That the construction contended for by the carriers does effect the purpose of protecting water competition will first be shown. It will then be demonstrated that to construe the paragraph as the appellant construes it would, under any circumstances, be inconsistent with the admitted powers of the Commission under the proviso of the first paragraph, and would, under certain circumstances, be to insure the inevitable and irremediable destruction rather than the protection of water competition.

#### IV.

THE LAST PARAGRAPH OF THE FOURTH SECTION, CONSTRUED IN CONNECTION WITH THE FOURTH SECTION AS A WHOLE AND WITH REFERENCE TO THE PURPOSE OF THAT SECTION, CAN HAVE NO APPLICATION WHERE, AS HERE, THE RAIL CARRIER HAS ORIGINALLY REDUCED ITS RATES IN COMPETITION WITH A WATER CARRIER WITH THE PERMISSION OF THE INTERSTATE COMMERCE COMMISSION GRANTED UPON THE APPLICATION OF THE CARRIER UNDER THE PROVISIO OF THE FIRST PARAGRAPH OF SECTION 4.

(A) Because so construed water competition is effectively protected

(1) *Whenever the rail carrier applies to the Commission for permission to reduce its rates in competition with a water carrier, by enabling the Commission to control the extent to which the carrier shall go in meeting such competition.*

(2) *Whenever the rail carrier reduces such rates without applying to the Commission for*

*permission*, by deterring the rail carrier from making rates so low as to destroy water competition through depriving such reductions of their essential *temporary* character by the penalty of having to maintain the reduced rates at both competitive and intermediate points after water competition is destroyed.

(B) Because to construe the last paragraph of Section 4 as applying where rates were originally reduced with the Commission's permission would be inconsistent with other provisions of Section 4; would needlessly penalize the carrier; and, under certain conditions, would render the destruction of water competition inevitable and irremediable.

(1) Would be inconsistent with the proviso of the first paragraph of Section 4 to the effect that

"The Commission may from time to time prescribe the extent to which the carrier may be relieved from the operation of this section",

which, as the Commission notes, 40 I. C. C. 35, p. 41,

"seems to contemplate a certain flexibility in the rates at competitive points varying with the degree of competition there found, in connection with which rates relief may be afforded according to the degree and extent of the competition."

(2) Would needlessly penalize the carrier, since the Commission can and does effectively protect water competition whenever a carrier applies, under the proviso of the first paragraph, for permission to meet such competition without maintaining the competitive rate at intermediate points.

(3) Would render the destruction of water competition inevitable and irremediable if, through error, the Commission might permit the carrier in the first instance to make a rate so low as to drive such competition out of existence.

As has just been noted, one of the chief dangers against which it was intended to protect water competition was that of being driven out of business by the *temporary* reduction of rates by the rail carriers to a point so low that water competition could not exist. It is obvious that water competition might be protected from this danger in two ways:

First, by preventing the rail carriers in the first place from reducing their rates to so low a point that the carriers could not exist, or

Second, by leaving rail carriers nominally free to so reduce their rates but effectively deterring them from so doing by depriving the reduction of its essential temporary character through the penalty of compelling its permanent maintenance after water competition had been eliminated. The carriers' construction of Section 4 affords water competition protection not alone in one but in both of the ways suggested.

Under the carrier's construction water competition is protected whenever the rail carrier makes application to the Commission under the proviso of the first paragraph for leave to reduce its rates to meet water competition without applying the reduced rates at intermediate points, because, under that proviso, the Commission may from time to time prescribe the extent to which the competitive rate may be depressed below the intermediate rate, and may thus in effect fix the competitive rate.

On the other hand, even though the rail carrier reduces its rates without such application to the Commission by electing to apply the competitive rate at intermediate points, the carrier's construction still protects water com-

petition, since to effectively endanger such competition the rail carrier must be free to make its reductions purely temporary and to restore the higher rates after water competition has been eliminated, and since the carrier's construction deprives the rail carrier of this power by the penalty of having to maintain the reduced rates after water competition has been destroyed.

In other words, under the carrier's construction, the penalty of the last paragraph of the Fourth Section is unnecessary to protect water competition where the rail rates are reduced with the Commission's permission, while the full effect of that penalty is afforded as a deterrent where the rail carrier reduces its rates without the Commission's permission.

Before undertaking to show that the appellant's construction of the Fourth Section, on the contrary, must, under certain conditions, destroy instead of protect water competition, it is desired to briefly refer to the decisions of the Commission showing that whenever application has been made by a rail carrier for permission to meet water competition without applying the competitive rate at intermediate points, the Commission has undertaken to effectively protect water competition by preventing the carrier from making a lower competitive rate than may be necessary to afford the rail carrier an equitable proportion of the competitive traffic.

In *Commodity Rates to Pacific Coast Terminals and Intermediate Points*, 34 I. C. C. 13, page 17, the Commission said:

"We should authorize a certain degree of relief from the requirements of the long and short haul

clause on this traffic to enable these carriers to more effectively compete with the water lines, but the rail carriers cannot expect, and the Commission should not authorize, such a degree of relief as will secure to the rail lines the same percentage of the traffic to the terminals as they enjoyed prior to the opening of the canal."

In Fourth Section Application No. 10336 (rates on iron and steel articles from Pittsburgh territory to Pacific coast ports), 38 I. C. C. 237, the Commission said, page 240:

"It seems clear that ordinarily the Commission should not, by relief from the Fourth Section, authorize the carriers to go any further in meeting water competition than is necessary to meet the competition afforded by water routes, because to do so would give a permanent advantage to some localities to the disadvantage of competing localities."

This report of the Commission forms part of the appellant's petition in the lower court (21-25), and in addition to the above quotation it should be noted that the report states, page 238 (21),

"Protests against the application were filed by the American-Hawaiian Steamship Company and Luckenbach Steamship Company, and they requested a hearing concerning the application. Hearing was held in 1915 and was attended by representatives of the railroads, the steamship interests, and the shippers."

The report then goes on to discuss the evidence offered by the steamship companies in opposition to the application of the carriers for leave to establish a rate of 55 cents per hundred pounds on iron and steel articles from Pittsburgh to Pacific coast ports, without making such rate applicable at intermediate points, and shows that, as a re-

sult of the evidence offered by the boat lines, the Commission refused to authorize a 55 cent rate and instead authorized a 65 cent rate, which, as appears from the above quotation, was as low a rate as the Commission considered necessary to fairly meet the competition afforded by the water routes.

In *Texarkana Freight Bureau v. S. L. I. M. & S. Railway Company*, 28 I. C. C. 569, page 583, the Commission said:

"While carriers may properly meet water competition, the maintenance of a lower rate to one point than to other points which are intermediate cannot be justified on the ground that it is necessary to suppress water competition."

It is clear then that water competition has been effectively protected by the Commission wherever the rail carrier has applied to the Commission under the proviso of the first paragraph of the Fourth Section for permission to reduce its rates to meet water competition, and that where such permission is asked the penalties of the last paragraph of the Fourth Section are unnecessary to protect water competition.

It remains to demonstrate that not alone are the penalties of the last paragraph of the Fourth Section unnecessary to the protection of water competition where the rail rates had been reduced with the Commission's permission, but that to construe the penalties of that paragraph as applicable where the rates had been so reduced is to insure, under certain conditions, the inevitable and irremediable destruction of water competition.

As has been noted under Section II of this argument, it is certainly conceivable that the Interstate Commerce

Commission might, by error or misunderstanding, permit a carrier, which had applied to it for leave to meet water competition, to make so low a rate as to destroy such competition. Under that section it appears that if the last paragraph of the Fourth Section be held to literally apply where the rail rates were originally reduced with the Commission's permission, the first proviso of the first paragraph must be given literal effect so as to permit the Commission to relieve the rail carriers from the prohibition of the last paragraph. The same reasons which are there urged in support of the literal application of the first proviso of the first paragraph, here argue as strongly that even if the literal wording of the last paragraph would make it applicable where the rail rates were originally reduced with the Commission's permission, such effect cannot be given the last paragraph because, under the conditions supposed, the mistake of the Commission would result not only in the permanent destruction of water competition, but in the ultimate destruction of the rail carriers themselves.

But even if such an extreme case might not arise, the appellant's construction of the Fourth Section would, under quite usual conditions and indeed under conditions that have arisen in connection with these very rates, penalize the rail carriers without any reason for so doing.

If, for instance, as is shown in the Commission's report on Fourth Section Application No. 10336, 38 I. C. C. 237 (the very report under which the carriers were granted permission to reduce the Pittsburgh-Seattle rate to 65 cents), the water rates on iron and steel articles rose from 30 cents in the fall of 1914 to 50 cents by July, 1915, the appellant would argue that even under such conditions,

had the carriers originally been permitted by the Commission to reduce their rates low enough to meet the competition of the 30 cent water rate, the Commission could not permit them to increase their rates based upon the 50 cent water rate, though the appellant does not question the right of the Commission in the first instance to refuse, as it did in the report cited, to permit the rail carriers to reduce their rates to 55 cents on the basis of the prior 30 cent water rate, in the face of the fact that the effective water rate had risen to 50 cents. Not even literal wording to that effect would be reason for so senseless a construction of the last paragraph of the Fourth Section, unless such a construction were consistent with the remainder of the section and necessary for the correction of the evil which that section sought to remedy.

Such a construction, however, is not only, as has been shown, inconsistent with the purpose of the Fourth Section, but it is, as the Commission notes, 40 I. C. C. 34, p. 41, inconsistent with the proviso of the Fourth Section that

"The Commission may from time to time prescribe the extent to which the carrier may be relieved from the requirements of this section."

This, as the Commission there states,

"seems to contemplate a certain flexibility in the rates at competitive points varying with the degree of competition there found, in connection with which rates relief may be afforded according to the degree and extent of the competition."

If further support be needed for the carrier's construction of the Fourth Section, it is found in the construction placed upon it by the administrative body charged with



its enforcement, the Interstate Commerce Commission, upon the re-opening of Fourth Section Application No. 10336, pp. 39-42, under which re-opened application the carriers increased the rates here attacked.

The Commission's opinion so well states the question and the considerations compelling the conclusion that the last paragraph of the Fourth Section has no application where the rail rates have originally been reduced with the Commission's permission, that full quotation of this portion of the Commission's opinion will be made. The Commission says, pp. 39-42 :

"The coast cities also contend that as some of the rates to Pacific coast points and the rates on California products from the California ports to the Atlantic seaboard have been reduced since June 18, 1910, on account of water competition, they cannot be again increased under the present circumstances because such increases are prohibited by that portion of the fourth section of the act as amended which reads as follows :

"Whenever a carrier by railroad shall in competition with a water route or routes reduce the rates on the carriage of any species of freight to or from competitive points, it shall not be permitted to increase such rates unless after hearing by the Interstate Commerce Commission it shall be found that such proposed increase rests upon changed conditions other than the elimination of water competition."

This section of the act must, of course, be construed in the light of the other sections, and in view also of the purpose and intent of this particular section. One of the primary purposes of the act to regulate commerce was to preserve and promote and not to destroy competition between carriers. The purpose of this clause was the preservation of water competition. It was intended to act as a restraint against rail carriers reducing their rates between competitive points to such a level as to render the water service between such points unremunerative and unattractive. Should

a rail carrier operating a route between competitive points in competition with a water route depress its rates, without authority of the Commission, to a level so low as to drive the water carrier from the field, the rail carrier is prohibited from thereafter increasing its rates except by permission of this Commission, and such permission cannot be extended unless reasons for the proposed increases are shown other than the elimination of the water competition. In the situation here considered, however, the carriers sought authority from this Commission to make the reductions which have been made. Hearings were held and careful examination was made of each proposed rate, both to the coast points and to and from intermediate points. The Commission had to determine the following facts:

(1) Were the proposed rates to the coast points warranted by the competition there existing?

(2) Were the lower terminal rates proposed such as to more than cover the out of pocket costs of the rail carriers that performed the service?

(3) Were the higher rates proposed to intermediate points and in the case of the east-bound rates from intermediate points, reasonable *per se* and not unjustly discriminatory against such points?

The first two questions being answered in the affirmative by the testimony offered, the Commission itself fixed the relative measure of the rates to intermediate points in the case of the west-bound rates and authorized the relative measure of the rates from intermediate points proposed by the carriers in the case of the east-bound rates under the conviction that the rates to and from intermediate points so proposed did not unjustly discriminate against such points. The carriers have proceeded in this case under the authority of the Commission to make only such rates to the coast points as would enable them to compete for and share in this traffic, and the withdrawal of boats from this service has not been on account of the rates made by the rail carriers with which the boats compete, but on account of slides in the Panama Canal and the extraordinary rise in ocean freights. The temporary withdrawal of the canal service in this instance is clearly not the result of any act of the carriers or of this Commission.

If, however, in the exercise of our judgment upon the facts presented in this case we had permitted the rail carriers to establish lower rates to the coast points than the actual competition there existing warranted, and upon hearing with proper notice to all interested parties it was subsequently shown that the effect of our order was to permit the continuance of rates to such points lower than were warranted by competition there existing, shall it be said that this condition must be perpetuated? To continue rates to the coast points that are lower than are necessitated by the actual water competition and higher rates to intermediate points and to other points over similar distances under like circumstances, is to perpetuate a discrimination that is unjust. The second and third sections of the act forbid all unduly preferential or unjustly discriminatory rates and practices. The portion of the fourth section above quoted does not repeal or annul any part of the second and third sections of the act to regulate commerce. If a coast point is receiving a lower rate than that to which it is lawfully entitled by the conditions there existing it is a preference at that point that results in prejudice against higher rated points whether intermediate thereto or not. Furthermore, the primary purpose of this portion of the fourth section being to preserve and promote competition by the water carriers, it must be so construed as to give effect to that purpose. If the rail rates between the two coasts, established in the light of conditions then existing, should, through such a complete change of conditions as that which has so recently come about, be now at a level so low as to make the service between the two coasts unattractive to the boat lines, should they be readjusted to a basis that will attract the water carriers back to the service and the primary purpose of the section be achieved or should they be held at the present level and the legislative purpose to a certain extent be defeated?

That portion of the fourth section which provides that—  
 'the Commission may from time to time prescribe the extent to which the carrier may be relieved from the requirements of this section—'

seems to contemplate a certain flexibility in the rates at the competitive points varying with the degree of competition there found, in connection with which rates relief may be afforded according to the degree and extent of the competition. It is admitted that the present rates upon schedule C articles from eastern defined territories to Pacific coast points, and the rates on barley, beans, canned goods, asphaltum, dried fruits, and wine from California ports to the Atlantic seaboard are lower than the present competition by water justifies or makes necessary. The maintenance of these low rates to the coast points and higher rates to or from intermediate points has the effect under present circumstances of unduly preferring the coast points and unjustly discriminating against intermediate points. This condition has existed for several months. The recent withdrawal of the principal steamship lines, however, and their contracts for use in other lines of service creates a probability that there will be but little effective water service during the current year and perhaps for a considerable period thereafter. We shall, therefore, rescind, effective September 1, 1916, those portions of our orders relating to the schedule C commodities and require that the rates on these commodities from eastern defined territories to Pacific coast terminals be adjusted effective on that date in accordance with the terms of our order respecting the schedule B commodities. The order responding to application No. 10336 respecting rates on iron and steel articles from Pittsburgh and related points will likewise be rescinded, effective September 1, 1916."

The carriers submit, therefore, that in view of the established purpose of Section 4 to protect water competition, the last paragraph of Section 4 must be construed to have no application where, as here, the carriers have reduced their rates to meet water competition with the Commission's permission, and must be held to apply only where the carriers have made such reduction without the Commission's permission.

## V.

EVEN IF THE LAST PARAGRAPH OF SECTION 4 APPLIES WHERE, AS HERE, THE RAIL RATES HAVE BEEN REDUCED WITH THE COMMISSION'S PERMISSION, THE COMMISSION HAS HERE FOUND THAT THE INCREASE ATTACKED RESTS UPON CHANGED CONDITIONS OTHER THAN THE ELIMINATION OF WATER COMPETITION AND, IN EFFECT, THAT THERE HAS BEEN, AS TO THESE RATES, NO ELIMINATION OF WATER COMPETITION WITHIN THE MEANING OF THE LAST PARAGRAPH OF SECTION 4.

FURTHERMORE, THE COMMISSION'S FINDINGS WERE MADE AFTER FULL HEARING, AND THOUGH IT IS NOT CLEAR OF RECORD WHETHER OR NOT THE APPELLANT ACTUALLY PARTICIPATED IN THE HEARING, THIS FACT IS IMMATERIAL AS UNDER THE DECISION OF THIS COURT, *UNITED STATES VS. MERCHANTS, ETC. ASSOCIATION*, 242 U. S. 178, P. 188, THE APPELLANT WAS NOT A NECESSARY PARTY THERETO AND WAS LEGALLY REPRESENTED BY THE COMMISSION.

As has been seen, the chief argument upon which the appellant attacks the validity of the increased rates is that the last paragraph of Section 4 forbids such increase without the finding of the Commission that it rests upon changed conditions other than the elimination of water competition, and that no such finding has been made by the Commission as to the increases here attacked. It has already been stated that these increases were made under the order of the Interstate Commerce Commission of June 5, 1916, in Re-opened Fourth Section Application No. 10336 (34) and its subsequent amendments and extensions of that order of July 13, 1916 (35), September 19,

1916 (79), and November 13, 1916 (83). The Commission in making its order of June 5, 1916, made a full report of the conditions upon which it justified that order, 40 I. C. C. 35, and this report, and therefore the Commission's finding, comprise part of the appellant's original petition in the District Court (28-33).

From the appellant's own petition, therefore, it clearly appears that the Commission, after hearing, found many changed conditions other than the elimination of water competition since March 1, 1916, when it had by its Fourth Section Order No. 5409 (24) permitted the carriers to reduce the 80 cent rate from Pittsburgh to Seattle to 65 cents. The changed conditions found by the Commission, and upon which it rests its order of June 5th rescinding its permission to the carriers to maintain lower rates to the coast ports than to intermediate points, will be shown by quotation from the Commission's report.

It appears from that report that the Commission reopened certain Fourth Section Applications upon the petitions of the Spokane Merchants Association and the Nevada Railroad Commission, asserting that conditions had substantially changed since those applications had been granted. It appears that the withdrawal of the steamship companies from coast to coast traffic was caused in part by the closing of the Panama canal through slides, and in part by the unprecedentedly higher rates available for transportation of ocean freight, due to the European War. The Commission unqualifiedly finds that the withdrawal of the water carriers was purely voluntary and due to conditions over which the rail carriers had no control. The Commission says, pages 33-41:

"This proceeding is the result of two petitions, one filed on behalf of the Spokane Merchants Association and the other by the Nevada Railroad Commission, asking the Commission to re-open for further consideration Fourth Section Applications No. 205, etc. \* \* \* (not including 10336) \* \* \* Through the reports and orders in these cases specific relief has been granted to the carriers permitting them to continue lower rates to Pacific coast points than to intermediate points. The petitions filed on behalf of the Spokane Merchants Association and by the Nevada Railroad Commission allege that by reason of slides in the Panama canal and the increased demand for ships, which has arisen in consequence of the European War, the water competition which had heretofore warranted certain relatively low rail rates from eastern defined territories to the Pacific coast, in large part disappeared. It is further alleged that *under the circumstances now existing* the maintenance of the present lower rates to the Pacific coast points than to intermediate territory has the effect of producing unjust and undue discrimination against intermediate points.

The Commission, therefore, by appropriate order, re-opened the applications respecting westbound rates on commodities comprised within a list known as schedule C, described in *Commodity Rates to Pacific Coast Terminals*, supra, and *Fourth Section Application No. 10336*, respecting rates on iron and steel articles from Pittsburgh and related pointed to Pacific coast terminals. The Commission also, on its own motion, re-opened Fourth Section Applications Nos. 9813, etc. \* \* \* *Hearing was ordered at Washington on April 24, 1916, before the Commission with reference to such changed conditions as were alleged to make necessary or appropriate any change in the orders heretofore entered with respect to these applications.*

It was shown at the hearing that the obstruction to canal traffic caused by the slides which from September, 1915, to April, 1916, had closed the Panama canal, had in large part been removed, and that the canal was re-opened on or about April 15, 1916. The two principal steamship companies that formerly

operated between the Atlantic and Pacific coasts via the canal, the American-Hawaiian Steamship Company and the Lukenbach Steamship Company, through their principal traffic officers, announced that owing in part to the obstructions to passage through the canal which had rendered it impossible to use that route from September, 1915, to April, 1916, and in part to the unprecedentedly high rates which are now being offered for the transportation of many kinds of ocean freight, they had for the time being withdrawn all their ships from the coast to coast business and chartered many of them for other purposes for periods extending into the future from 3 to 18 months. The prices obtained for the use of these ships, whether by the month or by the voyage, were exceptionally high. So long as such rates can be obtained for ocean service between the United States and foreign countries, there is no doubt that the coast to coast business will be unattractive to steamship lines at the rates now obtainable. Both of these companies announced their intention ultimately to return to this service, but stated that such return was unlikely before the end of the year 1916, and the time of such return depended in part upon the measure of the rates they would be able to secure for this service in competition with rail lines. The result of all the evidence offered was to show that there is not at this time any effective water competition between the two coasts and that there is little likelihood of any material competition by water during the present calendar year, irrespective of the action the Commission may take with respect to these petitions.

The rail carriers take the position that although the water competition has for the time being disappeared, the condition is but temporary, and the rates applied by the steamship lines during the first 6 months after the canal was opened are representative of the normal rates with which the rail lines must expect to compete if they hope to continue to haul any considerable percentage of the business to and from the Pacific coast points. \* \* \* The rail rates, therefore, on these schedule C commodities and the water and rail rates via Galveston on the California products named, when established, were not lower



than the conditions then existing warranted, if the rail lines were to continue to compete for this traffic with the ships. *It is perfectly clear, however, that the conditions formerly existing had been materially changed.* The unprecedented freight rates which are being paid for ocean transportation between this and foreign countries have attracted to that service practically all of the ships, regular or irregular, which had been heretofore engaged in the coast to coast service. *That the conditions with which we are confronted by are temporary is admitted.* How long such conditions will last is problematical. As the situation now stands, however, the rail rates on all these schedule C commodities from eastern defined territories to Pacific coast terminals are lower than the present conditions warrant, while at the same time higher rates are applied at intermediate points. \* \* \* The rate adjustment in question was established after exhaustive hearing and careful study as to each of the commodities involved, and was justified by the conditions then existing. *The war and an unparalleled rise in prices for ocean transportation have so changed the situation as to transform a relation of rates which was justified when established to one that is now unjustly discriminatory against intermediate points.*

*The representatives of the intermediate points urge that the conditions now existing, although unusual and probably temporary, will undoubtedly exist for a number of months to come, and that during this period the maintenance of these relatively low rates to coast points and higher rates to intermediate points constitutes undue preference in favor of the coast points and undue prejudice to intermediate points. The representatives of the coast cities both on the Atlantic and Pacific coast \* \* \* urge also that the present state of affairs is but temporary and that by the time a readjustment of these rates can be effected a change in conditions may have come about which will render a return to the present rates necessary.* \* \* \*

\* \* \* The coast cities also contend that as some of the rates to the Pacific coast points and the rates on California products from California ports to the

Atlantic seaboard have been reduced since June 18, 1910, on account of water competition, they cannot be again increased under the present circumstances, because such increases are prohibited by that portion of the Fourth Section of the act as amended, which reads as follows: (Quoting last paragraph of Fourth Section.)"

The Commission's report then proceeds as quoted in the preceding section of this argument, but it is necessary to re-quote here a part of what has been previously quoted. The Commission, as already noted, said, page 41:

"The carriers have proceeded in this case under the authority of the Commission to make only such rates to the coast points as would enable them to compete for and share in this traffic, and the withdrawal of boats from this service has not been on account of the rates made by the rail carriers with which the boats compete, but on account of slides in the Panama canal and the extraordinary rise in ocean freights. The temporary withdrawal of the canal service in this instance is clearly not the result of any act of the carriers or of this Commission."

Even, therefore, if the last paragraph of the Fourth Section be applicable where, as here, the rail rates were originally reduced with the Commission's permission, the italicized portions of the Commission's report, comprising a part of appellant's own petition, show that the Commission's order of June 5, 1916, under which these increases were made, rested on findings, both general and specific, of changed conditions other than the elimination of water competition. In fact the portion of that report last quoted shows that the Commission found that there had been no *elimination* of water competition, but that the water carriers had voluntarily and temporarily withdrawn and not as the result of any act of the carriers or of the Commission.

Germane to this last finding of the Commission is the Commission's report in the case of Insulated Wire and Cable Co. v. C. & N. W. Ry. Co., 26 I. C. C. 415. The Commission, after quoting the last paragraph of the Fourth Section, says, p. 416:

"It was testified that prior to 1903 the rate to Chicago was the same throughout the entire year. The tariffs now published name varying rates depending on the existence or absence of competition by lake transportation. A lower rate applies when navigation is open on the Great Lakes and a higher rate applies when such navigation is closed. We do not think the suspension of lake navigation during four months of the year can reasonably be regarded as an 'elimination of water competition,' within the meaning of the statute. It is merely a temporary interruption of the water route due to natural causes. The water competition has not been eliminated but continues as it has always existed. No change in the competition by water carriers has resulted from the reduced rate by the rail carriers."

With reference to the appellant's contention that it was afforded no hearing on the increase of the rates here attacked, it may be said that the record is not clear as to whether or not the appellant itself participated in the hearing of Re-opened Fourth Section Application No. 10336, upon which the Commission's report of June 5, 1916, just quoted, was made. That report shows that appellant's present counsel participated in that hearing as counsel for the Chamber of Commerce of Portland, Oregon, and the Commission's order (34) shows that it was a public hearing at which appellant might have appeared, whether it did or not. The question is, however, legally of no importance in view of the holding of this Court in *United States v. Merchants Ass'n.*, 242 U. S. 178, where this Court says, p. 188:

"\* \* \* The carrier is the only necessary party to the proceeding under Section 4. The Commission represents the public. While it is proper and customary for communities or shippers interested to participate in hearings held, there is no provision for notice to them. They are not bound by the order entered; at least in the absence of such participation. And if the rates made by the tariffs filed under the authority granted seem to them unreasonable, or unjustly discriminatory, Sections 13 and 15 afford ample remedy."

In short, it appears that if a finding by the Commission of changed conditions, other than the elimination of water competition, was necessary to the validity of the increases here attacked the appellant's petition shows that such a finding was made. Furthermore, that while it is not entirely clear whether the appellant participated in the hearing upon which was made the Commission's order under which the carriers published the increases here in issue, the appellant was not a necessary party to that hearing, but was legally represented by the Commission.

In conclusion, therefore, the carriers submit:

(1) That it is at least doubtful whether even the literal wording of the last paragraph of Section 4, standing alone, makes that paragraph applicable where, as here, the rail rates were originally reduced with the Commission's permission;

(2) That, if it does, the literal wording of the entire Fourth Section, including the proviso of the first paragraph, as distinguished from the literal wording of the last paragraph alone, would permit the Commission to relieve the carrier from the operation of the last paragraph;

(3) That the last paragraph, construed in connection with the Fourth Section as a whole and with reference to the purpose of that section, can have no application where, as here, the rail carrier has originally reduced its rates with the Commission's permission;

(4) That even if the last paragraph of Section 4 applies where, as here, the rail rates have been reduced with the Commission's permission, the Commission has here found that the increase attacked rests upon changed conditions other than the elimination of water competition and, in effect, that there has been, as to these rates, no elimination of water competition within the meaning of the last paragraph of Section 4.

Furthermore, the Commission's findings were made after full hearing, and though it is not clear of record whether or not the appellant actually participated in this hearing, this fact is immaterial as under the decision of this court, *United States vs. Merchants, etc., Association*, 242 U. S. 178, p. 188, the appellant was not a necessary party thereto and was legally represented by the Commission.

The carriers therefore respectfully ask the Court to affirm the order of the District Court dismissing the appellant's petition and supplemental petition (108).

JOHN F. FINERTY,

Solicitor for Carrier Appellees.

E. C. LINDLEY,

M. L. COUNTRYMAN,

CHARLES DONNELLY,

O. W. DYNES, and

A. C. SPENCER,

Of Counsel, for Carrier Appellees.



## APPENDIX.

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Fourth Section, Act to Regulate Commerce as amended, 24 Stat. L. 379; 36 Stat. L. 539.

SEC. 4. (*As amended June 18, 1910.*) That it shall be unlawful for any common carrier subject to the provisions of this Act to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as a through route than the aggregate of the intermediate rates subject to the provisions of this Act; but this shall not be construed as authorizing any common carrier within the terms of this Act to charge or receive as great compensation for a shorter as for a longer distance: *Provided, however,* That upon application to the Interstate Commerce Commission such common carrier may in special cases, after investigation, be authorized by the Commission to charge less for longer than for shorter distances for the transportation of passengers or property; and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section: *Provided further,* That no rates or charges lawfully existing at the time of the passage of this amendatory Act shall

be required to be changed by reason of the provisions of this section prior to the expiration of six months after the passage of this Act, nor in any case where application shall have been filed before the Commission, in accordance with the provisions of this section, until a determination of such application by the Commission.

Whenever a carrier by railroad shall in competition with a water route or routes reduce the rates on the carriage of any species of freight to or from competitive points, it shall not be permitted to increase such rates unless after hearing by the Interstate Commerce Commission it shall be found that such proposed increase rests upon changed conditions other than the elimination of water competition.



# Joint Statement of the Board of Directors

January 1, 1910

SHIRLEY & SON, CORPORATION, ATTORNEYS

THE UNITED STATES INTERSTATE COMMERCE COMMISSION  
WASHINGTON, D. C., ATTORNEYS

JOINT FOR THE INTERSTATE COMMERCE  
COMMISSION

ALBERT J. BARKER,  
General for Interstate Commerce Commission

W. J. PARKER,  
Of Counsel

WASHINGTON: GOVERNMENT PRINTING OFFICE: 1910

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# In the Supreme Court of the United States.

OCTOBER TERM, 1918.

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SKINNER & EDDY CORPORATION, APPEL-	} No. 215.
lant,	
v.	
THE UNITED STATES OF AMERICA, INTER-	
state Commerce Commission, et al.,	
appellees.	

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*APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES  
FOR THE DISTRICT OF OREGON.*

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## STATEMENT OF THE CASE.

This is an appeal by Skinner & Eddy Corporation, hereinafter called appellant, from a decree of the District Court for the District of Oregon dismissing a petition by appellant to enjoin and set aside certain orders of the Interstate Commerce Commission, hereinafter called the Commission.

By an order dated June 5, 1916, the Commission rescinded orders theretofore entered permitting certain carriers to depart from the requirements of the fourth section of the act to regulate commerce as to rates on certain commodities, including iron and steel, and required that they reduce the degree of discrimination then existing against intermediate points and in favor of Pacific coast terminals, as

specified in that order. This fourth section order of June 5, 1916, was made because of complaints filed by the Spokane Merchants Association of Spokane, Washington, and the Railroad Commission of the State of Nevada. The order was amended on July 13, 1916, by specifying the Pacific coast terminals referred to in the prior order of June 5, 1916.

Appellant filed its petition against the United States and the Commission, and against a great number of carriers who participated in the transportation of iron and steel articles from Pittsburgh, Pennsylvania, and related territory, to Seattle, Washington. The bill not only attacked the orders of the Commission referred to, but also sought to enjoin the carriers from charging more for the transportation of certain iron and steel articles from Pittsburgh, and related territory to Seattle than it was charging at the time of the entry of said orders by the Commission.

This is a part of the Trans-Continental Rate cases which dealt with rates from eastern territory to Pacific coast terminals and the rates from the same eastern points to what is known as intermountain territory. This subject matter was before this court in *Intermountain Rate Cases*, 234 U. S. 476. This matter has been under consideration by the Commission up to and subsequent to the bringing of the suit herein, and orders have been entered from time to time as changed conditions made necessary or proper. The opening of the Panama Canal had a marked effect upon rates to Pacific terminals. The Com-

mission allowed the carriers to reduce rates to those terminals and thus participate in the traffic. As a result the difference in rates between coast points and intermediate points was increased. Many interior points which had been accorded port rates were required to pay rates higher than the rates to the ports of call. This situation was before the court in the *Sacramento Case*, 242 U. S. 178. Subsequently, on account of changes in competitive conditions, both rail and water, including a temporary closing of the Panama Canal by slides, and the diversion of ships to European trade on account of the war, the Commission required the carriers to reduce the difference in rates between Pacific ports and intermediate points and authorized an increase in certain rates to the Pacific ports. It is not thought necessary to state all of the proceedings before the Commission in order to dispose of the issues in this case.

Appellant is attacking the rate of 75 cents per 100 pounds on iron and steel articles from Pittsburgh to Seattle and the orders of the Commission authorizing that rate. It seeks to enjoin any rate in excess of 65 cents per 100 pounds. In 1915 certain carriers who were engaged in the transportation of iron and steel articles from eastern points to Pacific coast terminals, including Seattle, applied to the Commission for authority to establish a rate of 55 cents per 100 pounds on iron and steel from Pittsburgh and its common rating points to Seattle. (Rec. 20.)

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<sup>1</sup> References are to printed pages of transcript of record.

The basis for that application was increased competition brought about by the opening of the Panama Canal. After hearing, the Commission made a report and order dated March 1, 1916 (38 I. C. C. 237; Rec. 21, 24), authorizing a rate of 65 cents on iron and steel articles from Pittsburgh territory to Seattle and other Pacific coast points. It should be kept in mind that the 65-cent rate to Seattle was lower than the rate from the same points of origin to intermediate destinations in intermountain territory and was discriminatory against those intermediate points. The only justification for such discrimination was the compelling water and water and rail competition at the Pacific Coast terminals.

In March, 1916, the Railroad Commission of Nevada and Spokane Merchants' Association complained of the discrimination and alleged that it was not justified by the then existing water competition. Those complaints called attention to the temporary closing of the Panama Canal by slides, the demand for ships in the trans-Atlantic trade, and removal of ships from coast to coast service to European service on account of the European war, and the accompanying increase in ocean freight rates. In response to those complaints the Commission reconsidered the matter, and on June 5, 1916, entered its report and order finding that water competition at Pacific coast terminals did not justify the degree of discrimination then existing against intermountain territory, and rescinded the permission theretofore

granted to depart from the fourth section and ordered the carriers concerned to reduce that discrimination.

The carriers thereupon on July 28, 1916, filed tariffs including a rate of 94 cents on iron and steel articles from Pittsburgh to Seattle, effective September 1, 1916. A great number of protests were filed, including one by appellant dated August 4, 1916. In the meantime, however, on August 2, the Commission had ordered a hearing upon the proposed rates. (Rec. 39.) On August 21, appellant filed its original petition in the District Court of Oregon. On August 29, the Commission made an order suspending until December 30, 1916, the tariffs filed by carriers in pursuance of the Commission's order of June 5, 1916, as amended July 13, this proceeding being entitled by the Commission "Investigation and Suspension Docket No. 909," and "Transcontinental Case," which is the case in which the order of June 5, as amended, was entered. This order of suspension had the effect of suspending the effective date of those fourth section orders to December 30, 1916. Subsequently on September 19 the Commission entered an order in the fourth section cases as docketed by the Commission as of August 31, 1916, postponing the effective date of the orders therein until December 30, 1916, in order to harmonize the records of the Commission on this subject matter which was then being carried in separate folders. On October 17, the Commission made an order reopening this matter, both Investigation and Suspension Docket No. 909



and Transcontinental Case, for further hearing. On November 13 the Commission postponed the effective date of the fourth section order of June 5, as amended, until further order of the Commission.

On November 14, 1916, the Commission authorized the carriers to cancel the tariffs theretofore filed, the effective date of which had been suspended, and to file a new schedule of rates in which the rates on iron and steel from Pittsburgh to Seattle were increased 10 cents per 100 pounds; that is, from 65 to 75 cents. The Commission stated that this increase, without any changes to intermountain points, would result in a lessening of discrimination against intermediate points. That authority of the Commission was as follows (Rec. 84):

INVESTIGATION AND SUSPENSION DOCKET NO. 909.  
TRANSCONTINENTAL CASE.

The Commission has granted authority to the Transcontinental Lines to cancel all of the protested eastbound and westbound rates between points on the Pacific coast and intermountain territory on the one hand and points in eastern defined territory on the other hand, contained in transcontinental tariffs which were suspended by the Commission in its orders in Investigation and Suspension Docket No. 909, in consequence of which the hearings on the suspended rates set for Chicago, November 20; Salt Lake City, November 28; San Francisco, December 4; Portland, Oreg., December 11; and Spokane, Wash., December 14, 1916, before Attorney-Examiner Thurtell, have been canceled.

Hearings on Fourth Section Applications Nos. 205, etc., respecting rates on commodities from eastern defined territory to Pacific coast points and intermediate points, and Fourth Section Applications Nos. 9813, etc., respecting rates on barley, beans, canned goods, asphaltum, dried fruit, wine and other commodities from Pacific coast ports to eastern destinations, set for the same places and dates will be held as scheduled.

It is understood that the Transcontinental Lines propose to file tariffs effective upon statutory notice December 30, 1916, applicable upon the so-called "Schedule C" commodities named in the tariffs suspended in I. & S. Docket No. 909, which will increase the present rates to the Pacific coast ports a maximum of 10 cents per 100 pounds on carloads and 25 cents per 100 pounds on less-than-carload traffic, but no changes to intermountain points from eastern groups A to E, inclusive, are contemplated, hence the discriminations under the fourth section now existing between Pacific coast ports and intermountain cities will be diminished to the extent of the increases to the Pacific coast ports. Rates from Missouri River and groups west thereof to intermountain cities taking maximum rates will be increased to the level of the rates to the Pacific coast ports, the maximum increases being 10 cents per 100 pounds on carloads and 25 cents per 100 pounds on less than carloads. It is also understood that the eastbound carload rates on asphaltum, barley, beans, canned goods, dried fruit and wine, from

Pacific coast ports will be increased 10 cents per 100 pounds.

Thereupon on November 18, 1916, the carriers filed schedules, effective December 31, 1916, in which the rate on iron and steel from Pittsburgh points to Seattle was 75 cents per 100 pounds. (Rec. 85.)

On December 16, 1916, appellant filed a supplemental petition in the District Court of Oregon, reciting further facts which had transpired since the filing of the original petition on August 21, 1916. In the supplemental petition appellant prayed for an injunction restraining the enforcement of the Commission's orders of June 5, 1916, and July 13, 1916, "so far as the same undertook, or attempted, or purported to permit the transcontinental rail carriers to increase their westbound rates on iron and steel articles from Pittsburgh to Pacific coast ports and restraining the defendant carriers from collecting or exacting on or after December 30, 1916, the increased rates on iron and steel articles, in carloads, from Pittsburgh to Pacific coast ports. \* \* \* ." (Rec. 73.)

Motions to dismiss were filed by defendants and on December 29, 1916, the District Court through Hon. William B. Gilbert, Circuit Judge, and Hon. Charles E. Wolverton and Hon. Robert S. Dean, District Judges, denied an application for a temporary injunction. On February 26, 1917, the District Court entered a decree dismissing the petition and supplemental petition for want of equity. (Rec. 109.)

## THE ISSUES.

The assignments of error are general. Appellant asks the court to hold that the Commission was without power to issue the order of June 5, 1916, as modified July 13, 1916. We apprehend, however, that the only serious attack is upon the above order of November 14, 1916, and the increase in rate based thereon, by reason of the last paragraph of section 4 of the act to regulate commerce, which is as follows:

Whenever a carrier by railroad shall in competition with a water route or routes reduce the rates on the carriage of any species of freight to or from competitive points, it shall not be permitted to increase such rates unless after hearing by the Interstate Commerce Commission it shall be found that such proposed increase rests upon changed conditions other than the elimination of water competition.

Carriers have in the past maintained rates on iron and steel from Pittsburgh to Pacific coast terminals lower than to intermediate points on account of competition by rail and water; that is, by rail from Pittsburgh to the Atlantic seaboard, thence by water and across the Tehuantepec Isthmus of Mexico, the Isthmus of Panama, or around the Horn. After the opening of the Panama Canal, rates on certain commodities to the Pacific coast were further decreased. As above stated, the Commission permitted a rate of 65 cents per hundred pounds on iron and steel from Pittsburgh to Seattle. On account of material changes in competitive conditions, the carriers were

later authorized by the Commission to raise that rate to 75 cents per 100 pounds, and directed to remove the discrimination to that extent against intermediate points.

It is contended by the Commission (1) that the parties to a fourth section proceeding are the Commission and the carriers; that, if any shipper thinks that any rate is unjust, unreasonable, unduly discriminatory or otherwise unlawful, he may make complaint under section 13 of the act, and may not go into court to enjoin fourth section orders, but must proceed before the Commission in accordance with that section; (2) that the above-quoted paragraph from section 4 should not be construed so as to be inconsistent with and overrule other provisions of the act; that the Commission may correct unjust discriminations and unreasonable rates even though the result be to raise rates after removal of water competition; (3) that the above-quoted paragraph of section 4 only applies to cases where the railroads have voluntarily reduced rates which have resulted in the suppression of water competition and thereafter such railroads seek to raise their rates voluntarily, but does not apply to cases where the reduction of rates was made by permission of the Commission in order to meet, not suppress, water competition, and the subsequent increase in rates is also made under authority of the Commission; (4) that water competition has not been eliminated, although temporarily not so active or potent (Commission's Report of June 5, 1916, Rec. 28-33);

(5) that the orders of the Commission and the increase of rates to the terminal points were based upon conditions other than the removal of water competition.

#### ARGUMENT.

##### I.

Appellant may not attack a fourth section order in court but must apply to the Commission under authority of section 13 of the act.

The parties to a fourth section proceeding are the Commission and the interested carriers. If a shipper feels himself aggrieved by reason of a fourth section order he may not go into court but must apply to the Commission for redress.

The carrier is the only necessary party to the proceeding under section 4. The Commission represents the public. While it is proper and customary for communities or shippers interested to participate in hearings held, there is no provision for notice to them. They are not bound by the order entered; at least in the absence of such participation. And if the rates made by tariffs filed under the authority granted seem to them unreasonable, or unjustly discriminatory, sections 13 and 15 afford ample remedy.

*United States v. Merchants Ass'n, etc.* (Sacramento Case), 242 U. S. 178, 188.

The above statement of this court is applicable to the present case. Continuing in that case, the court, through Mr. Justice Brandeis, said (p. 188):

Respondents contend that, after the amended order was entered and the tariffs

filed, they did apply to the Commission for relief "but were denied the right of a hearing" and that "their protest and demand were ignored and denied." What they did was to petition for a "rehearing" in the proceedings under the fourth section, to which they now say they were not parties, instead of applying for redress under section 13, as they had a legal right to do. They mistook their remedy. To permit communities or shippers to seek redress for such grievances in the courts would invade and often nullify the administrative authority vested in the Commission; and, as this case illustrates, the attempt of the court to remove some alleged unjust discriminations might result in creating infinitely more.

And so in the present case the petitioner can not be heard to assail orders entered in a fourth section proceeding. The remedy as given by the statute is under sections 13 and 15 of the act.

## II.

**The Commission had power to issue the order herein authorizing carriers to increase rates from eastern points to Pacific coast terminals.**

(a) The Commission is not only authorized to, but should, correct or change its orders from time to time to meet changed conditions and to prevent departures from the fourth section and discriminations against persons and places, except as competition at the farther distant points compels otherwise.

The fourth section of the act forbids a carrier to charge more for a shorter than a longer distance where the shorter distance is included in the longer unless authorized to do so by the Commission and only to the extent authorized. Also, lower rates to more distant points are likely to be, and in this case have been found by the Commission to be, discriminatory against intermediate points. Justification for a departure from the fourth section and for discrimination against intermediate points may be found in compelling water competition at the more distant point. It is that competition which prevents the discrimination from being undue and unjust.

It is the duty of the Commission to prevent undue discrimination as provided in sections 2 and 3 of the act; also in section 4 it is provided that "the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section." By section 16: "The Commission shall be authorized to suspend or modify its orders upon such notice and in such manner as it shall deem proper." By section 16a: The Commission may suspend or modify its orders and if upon rehearing "it shall appear that the original decision, order, or requirement is in any respect unjust or unwarranted the Commission may reverse, change, or modify the same accordingly."

It thus appears that the Commission has power and it is its duty to change and modify its orders from time to time to meet changing conditions.



*United States v. Merchants, etc., Ass'n., supra.* The justification for lower rates to Pacific coast terminals than to intermediate intermountain points is in order that the carriers may meet the competition at the ports, and if the rail rates to the ports yield a return more than sufficient to pay for the cost of the service the Commission may allow the carriers to reduce the rate, without reducing a reasonable intermediate rate, in order to participate in such transportation. The lower rates to the Pacific coast ports unquestionably affect injuriously intermountain points. This result, however, is due to the advantage of the geographical location of those Pacific coast ports. As competitive conditions change or become less potent, it immediately becomes the duty of the Commission to lessen or remove the discrimination against the intermediate points. To the extent that the lower rate to the more distant point is not made necessary by competition it is *unduly* discriminatory against intermediate points.

(b) But it is contended by appellant that the last paragraph of section 4 of the act takes away this power of the Commission. We again quote that paragraph:

Whenever a carrier by railroad shall in competition with a water route or routes reduce the rates on the carriage of any species of freight to or from competitive points, it shall not be permitted to increase such rates unless after hearing by the Interstate Commerce Commission it shall be found that such

proposed increase rests upon changed conditions other than the elimination of water competition.

The purpose of this paragraph was to prevent a railroad from unduly reducing its rates to a port and thus destroying water competition, and after the water competition is destroyed raising its rates when its patrons are not protected by the water competition. The provision should not be given a broader meaning than is necessary to serve its purpose unless its language will permit of no other construction. That proviso is directed at the carriers. It says the *carriers* may not reduce their rates, suppress competition, then raise their rates. It certainly does not mean that the Commission may not order the removal of discrimination. In the *Intermountain Rate cases, supra*, the court stated that the fourth section must not be construed so as to conflict with the second and third sections (p. 485).

The situation in this case presents a marked similarity to the situation before this court in *Texas & Pac. Ry. v. Abilene Cotton Oil Co.*, 204 U. S. 426. In this case, as in that, a mere reading of this one paragraph, independent of the entire act to regulate commerce, and without consideration of the purposes of that act and the means by which they are to be accomplished, would lend countenance to appellant's contention. In the *Abilene Case*, pages 441, 442, this court said:

True it is that the general terms of the section [sec. 9] when taken alone might

sanction such a conclusion, but when the provision of that section is read in connection with the context of the act and in the light of the considerations which we have enumerated we think the broad construction contended for is not admissible.

And again on page 446, the court said:

But it is insisted that, however cogent may be the views previously stated, they should not control, because of the following provision contained in section 22 of the act to regulate commerce, viz: "\* \* \* Nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies." This clause, however, can not in reason be construed as continuing in shippers a common law right, the continued existence of which would be absolutely inconsistent with the provisions of the act. In other words, the act can not be held to destroy itself.

And so we contend here that this paragraph of section 4 must be read and construed in connection with the entire act to regulate commerce, and particularly those sections which bestow upon the Commission the right and duty to remove unjust discrimination whenever and wherever it exists. This was certainly the intention of Congress in enacting the amendment to the fourth section of the act in 1910. Senator Elkins, chairman of the Committee on Interstate and Foreign Commerce, and who was

spokesman for the bill in the Senate, said, in reference to this fourth section (Senate Debates, 1910, p. 8239):

\* \* \* it is pertinent to observe that the general rules requiring rates to be reasonable and without discrimination are found in sections 1 and 3 of the interstate commerce act.

This very question became a matter of discussion when certain Senators expressed their fear that section 4 would not be construed in connection with the other provisions of the act. It was obviously the desire of all who discussed this matter that the entire act should be construed together. The proponents of the bill insisted that such would be the construction and the bill became a law. (Senate Debates, 1910, 8377-8380.)

But it is urged that the discrimination in favor of Pacific coast ports and against intermountain territory can be removed by the reduction of rates to intermountain territory. Appellant insists that this is what should have been done by the carriers in this case; that the commission had no power to authorize an increase of rates to the Pacific coast ports and that the carriers acting under the authority of the commission instituted unlawful rates. It should be kept in mind that the rates to intermountain territory from the eastern points in question have been found by the Commission to be reasonable and not excessive. If appellant's contention were adopted it would be necessary to order the carriers to charge less than a reasonable rate. This

situation could not be remedied except upon a change of other conditions. Such a construction should not be adopted, and if adopted might raise a serious constitutional question.

It may be urged that the act which may require the carrier to charge less than reasonable rates is valid as a penalty for reducing rates in competition with water transportation. Penalties are not favored and legislation creating penalties must be clear and unambiguous. Congress has been solicitous to preserve water transportation. On the other hand, it has not attempted to prevent a rail carrier from reducing its rates so that it may *participate* in the traffic to the competitive point. It has only attempted in this section 4 to prevent the wanton destruction of water transportation by the rail carriers. Congress, therefore, has seen fit to entrust to the Commission control over such matters, leaving it to the Commission to so control the rates that water transportation will not be wantonly destroyed, that the equilibrium between places may be preserved, and that discrimination when it becomes undue and unlawful may be removed.

It was the avowed purpose of Congress to foster and protect water transportation. If rail rates which had been reduced in competition with water rates could never be increased it might happen that, due to increased costs of water transportation, water carriers could not operate in competition with the rail rates. It being impossible to increase the rail rates, water transportation would have to cease.

If the reduction in rates was by authority of the Commission, and, as stated by it in its reports, to meet water competition, not suppress it, and, if the subsequent increase is also authorized by the Commission, the public interest is protected, giving to the carrier at the same time the right to meet the water competition and participate in the traffic.

The Commission dealt fully with this contention in its report which is set out in the petition. (Rec. 31.) *In The Matter of Reopening Fourth Section Applications*, 40 I. C. C. 35, 40, 41, 42. There the Commission said:

This section of the act must, of course, be construed in the light of the other sections and in view also of the purpose and intent of this particular section. One of the primary purposes of the act to regulate commerce was to preserve and promote and not to destroy competition between carriers. The purpose of this clause was the preservation of water competition. It was intended to act as a restraint against rail carriers reducing their rates between competitive points to such a level as to render the water service between such points unremunerative and unattractive. Should a rail carrier operating a route between competitive points in competition with a water route depress its rates, without authority of the Commission, to a level so low as to drive the water carrier from the field, the rail carrier is prohibited from thereafter increasing its rates except by permission of this Commission, and such permission can not be extended unless reasons for the proposed increases are

shown other than the elimination of the water competition. In the situation here considered, however, the carriers sought authority from this Commission to make the reductions which have been made. Hearings were held and careful examination was made of each proposed rate, both to the coast points and to and from intermediate points. The Commission had to determine the following facts:

(1) Were the proposed rates to the coast points warranted by the competition there existing?

(2) Were the lower terminal rates proposed such as to more than cover the out-of-pocket costs of the rail carriers that performed the service?

(3) Were the higher rates proposed to intermediate points and in the case of the eastbound rates from intermediate points, reasonable *per se* and not unjustly discriminatory against such points?

The first two questions being answered in the affirmative by the testimony offered, the Commission itself fixed the relative measure of the rates to intermediate points in the case of the westbound rates and authorized the relative measure of the rates from intermediate points proposed by the carriers in the case of the eastbound rates under the conviction that the rates to and from intermediate points so proposed did not unjustly discriminate against such points. The carriers have proceeded in this case under the authority of the Commission to make only such rates to the coast points as would enable them to compete for

and share in this traffic, and the withdrawal of boats from this service has not been on account of the rates made by the rail carriers with which the boats compete, but on account of slides in the Panama Canal and the extraordinary rise in ocean freights. The temporary withdrawal of the canal service in this instance is clearly not the result of any act of the carriers or of this Commission.

\* \* \* If the rail rates between the two coasts, established in the light of conditions then existing, should, through such a complete change of conditions as that which has so recently come about, be now at a level so low as to make the service between the two coasts unattractive to the boat lines, should they be readjusted to a basis that will attract the water carriers back to the service and the primary purpose of the section be achieved or should they be held at the present level and the legislative purpose to a certain extent be defeated?

That portion of the fourth section which provides that "the Commission may from time to time prescribe the extent to which the carrier may be relieved from the requirements of this section" seems to contemplate a certain flexibility in the rates at the competitive points varying with the degree of competition there found, in connection with which rates relief may be afforded, according to the degree and extent of the competition. It is admitted that the present rates upon Schedule C articles from eastern defined territories to Pacific coast points, and the rates on



barley, beans, canned goods, asphaltum, dried fruits, and wine from California ports to the Atlantic seaboard are lower than the present competition by water justifies or makes necessary. The maintenance of these low rates to the coast points and higher rates to or from intermediate points has the effect under present circumstances of unduly preferring the coast points and unjustly discriminating against intermediate points.

The legislative history of this amendment to the fourth section bears out the Commission's position, that it was intended to protect the public from the uncontrolled action of rail carriers.

The last paragraph of section 4 was an amendment offered by Senator Burton, and originally was attached to section 15 of the act. This amendment reads (Senate Debates, 1910, p. 7277):

Whenever a railway or railways in competition with a water route or routes shall reduce the rates on the carriage of any species of freight it shall not be permitted to increase such rates unless, after hearing by the Interstate Commerce Commission, it shall be found that such proposed increase rests upon changed conditions other than the elimination or the decrease in water competition, and the said Commission is hereby given the right to prescribe minimum railroad rates on lines competing with waterways whenever, in its opinion, the object of the railroad or railroads in reducing rates is to destroy waterway competition.

Before this amendment of Senator Burton was debated, another amendment was offered by Senator Simmons to section 4 of the act, which reads as follows (p. 7200):

*Provided further,* That when application is made to the said Commission by a carrier to fix a lower rate for longer than for shorter distances on account of water competition, said application shall not be granted if the Commission, after investigation, shall find that the lower rate asked for will destroy water competition.

This amendment was agreed to. Senator Burton, in discussing his amendment, said (p. 7203):

Mr. BURTON. I should like to explain briefly the amendment. Its object is to avoid the destruction of waterway traffic by railway competition. There are two branches or divisions of this amendment. The first provides that when a railroad has reduced a rate on a line or lines in competition with waterways, it shall not thereafter raise that rate unless it appears that the increase is based upon changed conditions other than the elimination of or the decrease in water competition.

Take, for example, a case in which the railway rate was 50 cents. I am referring to an actual case. The railway reduced the rate to 25 cents until the boats competing with it were driven out of commission. It then raised its [its] rate to 100 cents, or twice what it was before engaging in this competition and four times what it was when the effort

was made to drive the boats from the competing waterway.

I am frank to admit some doubt as to the validity of the provision—whether the railways could not go into court, and if the rate they fixed, say that of 25 cents, was confiscatory, whether they could be prevented from raising it to a figure which would pay interest upon the cost of their property. The doctrine of estoppel would hardly apply.

But it seems to me there is a principle involved here which should sustain this amendment. It is a part of our national policy to maintain transportation by water.

Great sums have been expended in the improvement of our rivers. Those expenditures have been largely nullified by ruinous railway competition. Such being the policy regarding waterway improvements, it seems to me its attainment can be secured by providing, as does this amendment, that a railway reducing its rates, when the object of such reduction is against public policy, when it is inspired by an ulterior motive, does so at its own risk. At any rate a railway, in the face of a provision of this kind, will be slow to lower its rates with a view to destroying water competition.

The amendment of Senator Burton was also adopted.

It thus appears that Congress desired two things, one, the preservation of water transportation, and the other to take from the rail carriers the arbitrary power, which they theretofore had, to reduce rates

in order to destroy water transportation, and then, after they had eliminated water competition, to raise their rates even to a higher level than had existed theretofore.

In the conference report, the paragraph as it now stands was substituted for the amendments theretofore adopted by the Senate, thus taking from the carrier its arbitrary power and giving to the Commission control of the matter so that it might regulate rates, having in mind preservation of water transportation, the interest of rail carriers, and the interest of the public.

It should be kept in mind that the rate adjustment in question is not the one desired or prescribed by the carriers. Carriers asked permission to establish a 55-cent rate from Pittsburgh to Seattle at the time that the Commission authorized a 65-cent rate (see report and order dated Mar. 1, 1916, Rec. 21). The carriers opposed the order of June 5, 1916, which authorized them to raise their rates to the ports, and directed them to diminish the degree of discrimination against intermediate points. Such was the attitude of the carriers in 1917 subsequent to the bringing of this suit, when the matter was again before the Commission. *Transcontinental Rates*, 46 I. C. C. 236, 243.

Throughout the consideration of this matter the discrimination against intermediate points has been a principal concern of the Commission. The order of January 29, 1915, as modified April 30, 1915, authorized rates to Pacific coast terminals with refer-

ence to intermediate points; so did the order of March 1, 1916. Discrimination was permitted only to the extent made necessary by competition at the terminals. The order of June 5, 1916, as modified July 13, 1916, was made upon complaint of the Railroad Commission of Nevada and the Spokane Merchants Association. These complaints charged that the discrimination existing against intermediate points was then undue and unjust because there was no compelling competition at the Pacific coast terminals. The Commission found that that discrimination was unjust. In 40 I. C. C. 35, at p. 41 (Rec. 32), the Commission said:

To continue rates to the coast points that are lower than necessitated by the actual water competition and higher rates to intermediate and to other points over similar distances under like circumstances is to perpetuate a discrimination that is unjust.

It thus appears that the Commission has attempted to preserve a balance between the competitive situation at the terminals on the one hand and the higher discriminatory rates to intermediate points on the other.

As will appear in *Transcontinental Rates*, 46 I. C. C. 236, this matter was again the subject of a report and order of the Commission on June 30, 1917. The carriers were ordered to cease the departure from the fourth section. The Commission found that competitive conditions at the Pacific terminals did not justify the discrimination against intermediate points

and ordered that discrimination removed. Practically all rates to Pacific coast terminals have been raised to the level of rates to intermountain territory or higher and that has been the situation since March, 1918. Upon that basis the general increases instituted by the Director General were based.

So far we have discussed discrimination against places. Equally injurious discrimination would exist against commodities which, under appellant's contention, the Commission would be powerless to correct. If rates on certain commodities should at any time be reduced by permission of the Commission to meet water competition, such rates could not be subsequently increased although rates on other and similar commodities might be increased. There would either be permanent discrimination against the commodities on which there was an increased rate or the carriers would be compelled to maintain a rate on such other commodities lower than reasonable rates.

(c) The last paragraph of section 4 is not applicable to the instant case because water competition has not been eliminated. There was a slide in the Panama Canal in 1915 which temporarily closed the canal. It was reopened in April, 1916. It is true that the unprecedented demand for shipping in trans-Atlantic service has attracted most of the ships from our coast-to-coast service. Rates for water transportation have increased enormously. The competition has not ceased, but has not been so potent in the sense that it required such low rates to meet it.

This situation is pointed out by the Commission in its report, *Rates on Iron and Steel Articles from Pittsburgh Territory to Pacific Coast Ports*, dated March 1, 1916 (Rec. 21), 38 I. C. C. 237; *In the Matter of Re-opening Fourth Section Applications, Nos. 205, etc.*, dated June 5, 1916, 40 I. C. C. 35 (Rec. 28); and in *Transcontinental Rates*, dated June 30, 1917, 46 I. C. C. 236. In the latter case at page 253 the Commission said:

We do not consider the water competition between the two coasts as having been eliminated. \* \* \* The water service has suffered an interruption, however, which has already been prolonged for more than a year. Every present indication points to a continued scarcity of boats for this service as long as the war continues. The canal and the ocean are still available for commerce, and the time will come when this service will be re-established. It is on account of the interruption to this service that we have been petitioned to reopen these applications that they may be dealt with as present circumstances warrant.

Even if the water competition had been entirely eliminated we think that the last paragraph of section 4 refers to elimination of water competition as a result of the action of the rail carriers in reducing their rates. The Commission found in its report of June 5, 1916 (Rec. 32): "The temporary withdrawal of the canal service in this instance is clearly not the result of any act of the carriers or of this Commission." The provision in the statute was intended to protect

the public and water transportation from destructive competition by rail carriers. When the water competition is lessened, suspended, or eliminated by outside forces the provision of the statute is not applicable.

### III.

**The orders of the Commission and the increase of rates to the terminal points were based upon conditions other than the removal of water competition.**

(a) Discrimination existed in favor of Pacific coast terminals and against intermediate intermountain points. The Commission found this discrimination to be undue and unjust and because that discrimination was undue and unjust ordered its removal. (Rec. 32, 85.) It is true, of course, that the water competition at the Pacific coast terminals was at one time such that the discrimination against intermediate points was not undue or unjust. It was on account of the removal of that competition that the discrimination became undue and unjust. The Commission's orders, however, and the carrier's action under authority of those orders were based upon undue and unjust discrimination and not upon the mere removal of competition. In other words, the increase in rates was not based upon a finding by the Commission of a reasonable maximum rate to the Pacific coast terminals. It was the additional element or "*condition*" of discrimination which was the basis of the Commission's orders and the carriers action pursuant thereto.



(b) It is not alone water transportation through the Panama Canal which has affected competitive conditions at the Pacific coast terminals. The route by way of the Tehuantepec Railroad has been closed for some time. In the Commission's report of March 1, 1916 (Rec. 22), it said:

The Tehuantepec Railroad is not available as a link in a through route on account of war conditions in Mexico. The Panama Railroad is not in condition to handle the traffic which the steamboat lines could bring to it. Many of the boats that had used the canal are not equipped with fuel capacity or are not of such seagoing character as to undertake the long and rather perilous route through the Straits of Magellan.

All of these various routes have had their effect upon rates to Pacific coast terminals. There has been a change, not alone in the water transportation but also in the rail transportation of these competitive routes, particularly the Tehuantepec Railroad and the Panama Railroad. The action of the Commission, therefore, is based upon conditions other than the elimination of water competition.

It is unnecessary to comment upon all the contentions made by appellant. We simply call attention to one or two attacks upon the power of the Commission which we think are wholly without merit. In point 4 on page 31 of appellant's brief, it is contended that the Commission may not amend or vary a fourth section order, except upon application of a

carrier. This is not only contrary to all the provisions of the act giving the Commission power to reverse, set aside, vary, or amend, its orders from time to time as changing conditions may warrant, but is contrary to the very language of section 4 itself, which is relied upon by appellant as the basis of its contention. Section 4 provides that the Commission may authorize carriers to charge less for longer than for shorter distances over the same route. Even as to this it was said in the *Sacramento Case, supra*, that it may be doubted if an application by the carrier was a prerequisite to action by the Commission. Section 4, however, continues as follows:

And the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section.

It might well be that the carrier would desire no modification, but certainly that would not prevent the Commission from making such changes as conditions may require.

Appellant makes much of the fact that the Commission entered an order in the fourth section cases referred to subsequent to September 1, 1916, *nunc pro tunc* as of August 31, 1916. The order of June 5, 1916, as amended, in the fourth section cases was by its terms effective September 1, 1916. Following that order carriers filed certain schedules of rates. These schedules were protested and on August 29 the Commission suspended their effective date until

December 30, 1916. This order was entered in Investigation & Suspension No. 909 and *Transcontinental Case*, the latter being the case in which the order of June 5 was entered, and resulted in postponing the effective date of the order of June 5 in so far as it pertained to the suspended rates. The order of June 5, therefore, had not become *functus officio*. Irrespective of this, however, even if the effective date of the order of June 5 had not been suspended, the Commission may at any time, upon complaint or upon its own motion, modify, change, reverse, or suspend its prior orders.

Appellant alleges that it will be injured by an increased rate and that it had made contracts based upon then existing rates. Of course, no one has a vested right in a railroad rate. Any increase in rates may affect shippers injuriously. This can not interfere, however, with the proper exercise of the governmental function of regulating rates.

#### CONCLUSION.

Throughout its dealing with the transcontinental rate problem, the Commission has attempted to protect all points from discrimination and has done so except in so far as competitive conditions at the coast terminals compelled otherwise. The primary purpose of the act to regulate commerce was to prevent unjust discrimination. The last paragraph of section 4 was designed to take from rail carriers the power to destroy water competition and then raise rates at will. That had been a common and well-

known practice of rail carriers. That provision, however, should not be construed to take from the Commission the power to prevent undue and unjust discrimination and to prevent the Commission in other respects from bringing about a fair and equitable adjustment of railroad rates.

Respectfully submitted.

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